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Supreme Court of the United States.

OCTOBER TERM, 1946.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY, *Petitioners,*

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR, ET ALS., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, the Protective Committee for Bonds of Old Colony Railroad Company, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on January 13, 1947, in the form of an Order for Mandate pursuant to opinions of the majority of said

Court rendered January 13, 1947, affirming Orders of the United States District Court for the District of Connecticut, approving and confirming a plan of reorganization of the New York, New Haven & Hartford Railroad Company, debtor, and Old Colony Railroad Company, and others, secondary debtors, under Section 77 of the Bankruptcy Act (11 U.S.C. § 205).

Opinions Below.

The Memorandum of Decision of the District Court is unreported, but may be found in the record (p. 11891). The opinions of the majority of the Circuit Court of Appeals, rendered January 13, 1947, are not yet reported but are printed in full in Stipulation Volume I (filed herewith), Nos. 15 and 17, pp. 12655 and 12765. (*See Note below.*) A prior decision of the Circuit Court of Appeals, which is relevant to the questions herein in some respects, is reported in 147 F. 2d, 40 (January 2, 1945).

NOTE on the Record and references thereto:

The record for this proceeding is based on stipulation (Stip. R. II, No. 35; *see also* Nos. 33 and 34) of the parties to the proceedings in the Circuit Court of Appeals below (except parties appellant not seeking certiorari), and consists in substance of the following:

(1) *Stipulation Volumes I* and *II*, containing opinions, reports and other basic documents newly assembled from the I.C.C., District Court and Circuit Court of Appeals record of the proceedings in the matter of the reorganization of New York, New Haven & Hartford Railroad Company and Old Colony Railroad Company, and bound for the convenience of this Court, as stipulated for the purposes of this Petition and of the petition of the Institutional Group for Boston Terminal Company bonds to be filed with this Court.

(2) *C.C.A. Record* for this proceeding in Circuit Court of Appeals for the Second Circuit, F. 2d, (decided January 13, 1947), as certified by the Clerk of said Court.

(3) *Prior Supreme Court Record*, filed in connection with *Massachusetts* v. *New York, New Haven & Hartford Railroad Com-*

Jurisdiction.

The Circuit Court of Appeals entered judgment on January 13, 1947, pursuant to majority opinions rendered January 13, 1947, and its Order for Mandate was entered on February 4, 1947, after denial on February 1, 1947, of your petitioners' petition for rehearing. The time for filing petitions for certiorari in the above-entitled cause was extended to and including May 15, 1947, by order of a justice of this Court dated April 1, 1947. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938), 28 U.S.C. § 347(a), and under Section 24(c) of the Bankruptcy Act (11 U.S.C. § 47(c)).

Statute Involved.

The statute involved is Section 77 of the Bankruptcy Act (11 U.S.C. § 205).

Statement of Matter Involved.

This petition seeks a review by this Court, *for the first time in this proceeding*, of a plan of reorganization for

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pany; cert. denied, 325 U.S. 884, 89 L. ed. 1999 (June 18, 1945).

(Reference may also be made to the printed record in the reorganization proceedings of the District Court for the District of Connecticut.)

References in this Petition, and in your petitioners' Brief in support, will use abbreviated designations of the parts of the record referred to, as follows:

Stipulation volumes	**Stip. R.**
C.C.A. Record from Court below	**C.C.A. R.**
Prior Supreme Court Record	**Prior S.C. R.**
District Court Record, generally	**D. R.**

Parts referred to will be more specifically designated by volume numbers (A, B, or I, II, etc.) and Exhibit numbers, as appropriate, and by page numbers used in such volumes or Exhibits.

Old Colony Railroad Company, secondary debtor in proceedings under Section 77 of the Bankruptcy Act for reorganization of the New York, New Haven & Hartford Railroad Company. *Since* the Old Colony properties had been under long term lease to the New Haven, and the lease was disaffirmed by the New Haven trustees in 1936; *since* the Old Colony thereafter became a secondary debtor in the proceedings for the reorganization of the New Haven; *since* the railroad properties of Old Colony have, during the pendency of these proceedings, been operated by the trustees of the New Haven *"for the account of Old Colony"* under court order, such operations resulting in a prior lien claim against Old Colony in the estimated amount of $10,500,000; *since* Old Colony's unsecured claim against New Haven for rejection of the lease has been adjudicated at $47,000,000; *since* the non-operating or non-railroad properties of Old Colony bulk extraordinarily large in the value of its total assets, determined on any basis; *since* the comprehensive plan relating to Old Colony, debtor, contemplates a *sale* of its properties to the reorganized New Haven; *since* the Old Colony bondholders, the only class of creditors voting as creditors of Old Colony upon the comprehensive plan, in a representative vote rejected the present plan; *since* the Circuit Court of Appeals has once ordered the present plan for Old Colony to be remanded to the Interstate Commerce Commission as being a product of purported compromise and not founded upon an exercise by the Commission of its independent judgment in the premises; *and since* the plan specifically authorizes the District Court to eliminate from the comprehensive plan all provisions for reorganization of Old Colony, if the Court considers that opposition by the Old Colony interests will unduly delay the reorganization of New Haven—numerous questions of law relating to the methods and principles of valuation and administrative

procedure under, as well as the application of the "cram-down" provisions of, Section 77 are raised by this petition, which have not heretofore been passed upon by this Court, but which should be settled by it.

The following comprehensive statement of facts is necessary to an understanding and appraisal of these questions. The questions presented appear at page 30 *et seq.* below.

The Course of the Proceedings.

On October 23, 1935, the New Haven filed its petition in the United States District Court for the District of Connecticut seeking reorganization under and pursuant to the provisions of Section 77 of the Bankruptcy Act, which petition was duly allowed, and trustees were appointed to administer the New Haven estate. On June 2, 1936, the New Haven trustees disaffirmed [1] as burdensome the New Haven's 99-year lease of the Old Colony properties entered into in 1893, and on June 3, 1936, as then owner of a majority of the common stock of Old Colony (which stock has since been declared valueless), caused Old Colony to file, in the same District Court and in the same proceedings as those of the principal debtor, a petition for reorganization, stating, in conformity with the provisions of Section 77 (b), that Old Colony desired to be reorganized "in connection with or as a part of the plan of reorganization" of the principal debtor. This petition was likewise approved [2] as properly filed and, over the objections of numerous parties in interest, the individual trustees of the principal debtor were appointed trustees of the Old Colony estate

[1] *See* Prior S.C. R., vol. B, Ex. 33, p. 721 (text of lease, D. R. 737).
[2] Prior S.C. R., vol. B, Ex. 34, p. 731; Ex. 35, p. 747; and Ex. 36, p. 817.

also, in spite of the obvious fact that the interests of the two roads upon disaffirmance of the lease became thenceforth adverse.

Since the Old Colony, as a result of its long operation by the New Haven, had neither operating equipment nor personnel nor funds sufficient to conduct independent operation, the trustees of the principal debtor were ordered[3] to operate the Old Colony lines *"for the account of Old Colony"* and accorded a lien on all its assets, prior to the lien of the Old Colony bonds, to secure it against any losses that might be incurred as a result of such operation. This operation has been described by this Court as an "involuntary" operation conducted solely for public convenience. See *Palmer* v. *Webster & Atlas National Bank of Boston,* 312 U.S. 156. (The New Haven trustees' claim for such losses, and for taxes, Boston Terminal charges and administration expenses allocated to Old Colony is hereinafter referred to as the *"prior lien claim."*)

Thereafter a Segregation Formula was promulgated providing for an allocation of charges and earnings to and among the various divisions and leased and former leased lines that comprised the New Haven system. It did not undertake, however, to determine the manner in which the respective properties should be operated, such operations being left presumably to the discretion of the New Haven trustees appointed by the Court. It is significant, however, that the properties of Old Colony have in fact been operated on a system basis in spite of the order that they be operated "for the account of Old Colony," a factor contributing to Old Colony's alleged recurrent losses.[4]

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[3] Prior S.C. R., vol. B, Ex. 36, pp. 817, 819. *See* Bankruptcy Act, Section 77(c)(6).

[4] See Report of Victor V. Boatner, dated February 15, 1946, filed as Appendix A to the Report of the Special Commission to Investigate the Railroad Transportation Facilities Within the Com-

It was not until March 22, 1940, that the Commission certified, in its Original Report,[5] a plan of reorganization for the principal debtor involved in this proceeding, and that plan contained *no* provisions whatsoever with respect to Old Colony, it being the then view of the Commission that Old Colony's operating losses and the prospects for continued operating losses rendered it undesirable and impractical, if not impossible, to propose any plan for Old Colony at that time.[6] However, on February 18, 1941, over four and a half years after the filing of the Old Colony petition, and after certain savings and economies in the operation of the Old Colony properties had been effected or projected, the Interstate Commerce Commission certified to the Court its (First) Supplemental Report and Order,[7] proposing for the first time a plan for Old Colony.

This plan provided in substance for the purchase by the New Haven of all the Old Colony properties, franchises and assets at a price which, after satisfaction of the prior lien claim, would net the Old Colony bondholders $16,448,000 face amount of the securities of the reorganized New Haven, an award equal to the principal amount of Old Colony bonds then and now outstanding.[8] In this Re-

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monwealth of Massachusetts (Massachusetts General Court, 1946, House Doc. 2119).

[5] 239 I.C.C. 337 (1940), Prior S.C. R., vol. A, Ex. 1, p. 7863.

[6] As of December 21, 1937, the prior lien claim of the New Haven trustees against Old Colony for operating losses was adjudicated at some $11,000,000, including over $3,000,000 of losses from their operation of the properties of the Boston & Providence Railroad—a leased line of the Old Colony, which lease was subsequently disaffirmed by the trustees of New Haven in their capacity as trustees of Old Colony

[7] 244 I.C.C. 239 (1941), Prior S.C. R., vol. A, Ex. 2, p. 8037.

[8] The total claim of the bonds of Old Colony, as of December 31, 1943, the "cut off" date for Old Colony, principal and interest, amounted to some $21,612,000. The "cut off" date for the principal debtor's plan is June 30, 1943.

port the Commission reviewed in detail and at length the circumstances giving rise to this determination of value and price.

On June 3, 1941, hearings were held before the District Court on this plan, at which numerous parties objected to the treatment accorded the Old Colony bondholders as grossly excessive. Following argument, the Court suggested "the formation of an informal committee to explore the possibilities of progress by compromise rather than multiparty litigation"[9] and to "formulate a compromise of the conflicting views concerning the terms of the plan dealing with Old Colony Railroad."[10] Such a committee was thereupon appointed and proceeded to its task. Thus, within slightly more than four months of the time when the Commission first certified a plan for Old Colony, the Court had diverted the proceedings into the channels of "compromise" and at the same time thereby indicated its future disapproval of that plan.

Following this June 3d hearing and the significant appointment of the compromise committee, your petitioners, at the present moment representing upwards of $4,000,000 face amount of bonds, organized "for the purpose of protecting the rights of such holders of bonds of Old Colony Railroad Company . . . as might file authorizations with it," and upon petition to the Court were admitted as a party intervenor to these proceedings on July 24, 1941.[11]

On September 19, 1941, the compromise committee filed its Report[12] with the District Court, stating that it had "endeavored to formulate proposals which would compromise the conflicting views [relative to Old Colony] on a give and take basis." *The committee, however, did not un-*

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[9] Prior S.C. R., vol. A, Ex. 6, pp. 8922a, 8958.
[10] *Op. cit.*, 9013.
[11] Prior S.C. R., vol. B, Ex. 105, p. 8675, and Ex. 106, p. 8679.
[12] Prior S.C. R., vol. A, Ex. 6, pp. 8922a, 9013-9031.

dertake to determine the price which the New Haven should pay for the Old Colony properties, confining itself to the development of the fundamentals of a plan of reorganization, more particularly provisions which, if the New Haven should purchase the Old Colony properties, would insulate *it* against losses that might be occasioned from passenger operations on the Old Colony lines and from obligations to Boston Terminal Company, owner of South Station, Boston.[13]

On December 8, 1941, the Court rendered its Opinion on Plan,[14] disapproving the same and condemning the value of the Old Colony properties determined by the Commission as excessive for properties "productive of nothing but losses." The Court held that, as to the reorganization of Old Colony, "the best prospect of prompt progress appears to be by reasonable compromise" and commended the compromise committee's report to the parties and the Commission, appending it to its opinion as Exhibit A.[15]

Thereafter, on January 27, 1942, the Commission issued its Notice of Hearing to be held at Brooklyn, New York, on February 17, 1942, for the purpose, among others, of receiving evidence relative to Old Colony. At the time of this hearing no plan relative to Old Colony (other than the disapproved plan) was before the Commission, unless it was contained in the compromise committee report. This report, however, did not set a value on the Old Colony assets or a price to be paid therefor to Old Colony or its bondholders. *This is the last hearing ever held by the Commission in these proceedings,* and a reading of the record [16] of this hearing will show that no evidence was there intro-

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[13] *Op. cit.*, 9014.
[14] *Op. cit.*, 8922a.
[15] *Op. cit.*, 9013.
[16] C.C.A. R., I.C.C. *in matter of* the N.Y., N.H. & H. R. Co., Debtor, Fin. Docket No. 10992, February 17-20, 1942.

duced which would serve in any way to support a reduction by the Commission of the value of the Old Colony properties as determined by it in its (First) Supplemental Report and Order of February 18, 1941. The only evidence bearing on value introduced at that hearing, in addition to the testimony of a single witness as to the probable market or cash value of the proposed new New Haven securities, was in reference to the possibility of providing the New Haven, if it should acquire the Old Colony properties, with a means of *escape* from the losses which it was contemplated would result from Old Colony's passenger traffic and its share of the Boston Terminal expenses, such escape provisions being calculated to *enhance* rather than detract from the value of the Old Colony properties.[17]

At the beginning of this hearing it was represented to the Commission that it would be impractical for the compromise committee to negotiate further without some "assurance that their labor would prove fruitful,"[18] and that the Court had stated its confidence that, if "official encouragement and approval" should be forthcoming, progress could be made toward a fair purchase price. Thereupon "at the conclusion" of the hearing (February 20, 1942) it was ruled that the record should be kept open until April 4, 1942, to permit the filing of a report which would propose a solution of the Old Colony problems.

On April 4, 1942, the so-called Joint Report[19] was filed with the Commission. It recites that "the proposals contained in the original Report of the Compromise Committee are, with but little modification, reaffirmed in all re-

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[17] These provisions have since received the approval of the Courts. 147 F. 2d, 40; *cert. denied*, 325 U.S. 884, 89 L. ed. 1999.

[18] Stip. R. II, No. 36, p. 134. *See also* Third Supplemental Report of Commission, 254 I.C.C. 63, 64, Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9761.

[19] Stip. R. II, No. 36, p. 133.

spects by this Joint Report . . ." and it is further stated that [20]—

> "Faced with the problem of reaching an agreement as to *price* pursuant to the aforesaid ruling, the Committee decided that representatives of the two Groups of security holders having conflicting views as to Old Colony and of the principal Debtor were better qualified to negotiate *price* than were the members of the Committee. Accordingly, negotiations were had between a representative of the Insurance Group, a representative of the Mutual Savings Bank Group owning a substantial portion of Old Colony First Mortgage Bonds,[21] and counsel for the principal Debtor. This Report embodies the results of such negotiations." (Emphasis supplied.)

The three "negotiators," all of them interested primarily or exclusively in the New Haven and but secondarily or not at all in Old Colony, proposed a purchase price for the Old Colony properties which, after satisfaction of the prior lien claim of the New Haven trustees, taken at $10,500,000, would net the Old Colony bondholders $5,756,800 face amount of securities of the reorganized New Haven, an amount of securities some $10,691,200 less than that proposed by the Commission in its (First) Supplemental Report and Order of February 18, 1941.

The Joint Report thus prepared was never submitted to your petitioners for their consideration or approval, nor

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[20] Stip. R. II, No. 36, p. 135.

[21] The Joint Report failed to state that this Group also owned over $30,000,000 of *New Haven* bonds. Since the filing of the Joint Report, this Group has reduced its Old Colony holdings to less than $1,000,000 face amount of bonds. Neither the Insurance Group nor the principal debtor has ever purported to represent Old Colony interests.

were any of the parties to the proceeding ever accorded an opportunity to offer evidence, examine or cross-examine witnesses or argue orally with respect to the plan and the price fixed by the Joint Report. They were permitted to file briefs only.

On October 6, 1942, the Interstate Commerce Commission certified to the Court its Third Supplemental Report and Order,[22] which, as to those provisions relating to the Old Colony purchase price,[23] is substantially a *verbatim* copy of the Joint Report. The Commission concluded the Old Colony section of its Report as follows:[24]

> "In its decision disapproving the plan approved by us in our report of February 18, 1941, *supra*, the court in commenting upon the difficulty of fairly determining the value of the Old Colony properties, and the consideration which the principal debtor should *pay* for such properties, in accordance with the standards set in *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, expressed the opinion that the best prospects of a prompt and fair reorganization of the Old Colony would seem to lie in a compromise by the interested parties.
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> "As seen herein, the principal debtor and its major secured creditors, the Old Colony and the mutual savings bank group, the latter holding more than one-half of the bonds of the Old Colony, and a representative of the public, an assistant attorney general of the Commonwealth of Massachusetts (it was understood that any agreement of the Assistant Attorney General would not be binding on the Commonwealth), have agreed upon a *compromise purchase price*. The basis

[22] 254 I.C.C. 63 (1942), Prior S.C. R., vol. A, Ex. 8, p. 9753.
[23] *Op. cit.*, 89-94, Prior S.C. R., vol. A, Ex. 8, pp. 9780, 9789-9794.
[24] *Op. cit.*, 96, Prior S.C. R., vol. A, Ex. 8, p. 9797.

of the compromise has been fully explained. The desirability in some situations, of a compromise has been stated by the Supreme Court in *Case et al. vs. Los Angeles Lumber Products Co., Ltd. 308 U.S. 106.* While the *agreed purchase price* is smaller in amount than that which we formerly determined, upon further consideration, we find that the *purchase price* proposed in the joint report is fair and equitable, and in our opinion, conforms to the principles which the court in its opinion indicated governed, and we will modify the plan accordingly." (Emphasis supplied.)

Within sixty days of the filing of the Third Supplemental Report and Order of the Commission, dated October 6, 1942, certain parties to the proceedings filed petitions for modification of or for further hearing and argument on the plan of reorganization. All such petitions were denied and the Commission on July 13, 1943, certified to the Court its Fourth Supplemental Report and Order,[25] which modified the comprehensive plan in certain respects, but did not affect the price for the Old Colony properties provided in the plan. In discussing a proposal of the Commonwealth of Massachusetts relative to Old Colony, the Commission said:[26]

"It is likewise clear that to modify materially the provisions of the Joint Report in respect to the Old Colony would be to nullify the compromise reached after extended negotiations with little or no expectations that the suggested modification would prove acceptable to the interested parties. The result again would be a further delay in the consummation of the reorganization of the principal debtor and the Old Colony."

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[25] 254 I.C.C. 405 (1943), Prior S.C. R., vol. A, Ex. 9, p. 10123.
[26] *Op. cit.*, 422, Prior S.C. R., vol. A, Ex. 9, pp. 10155-10156.

On December 21, 1943, the District Judge, after hearing objections to the plan, entered his Opinion on Plan [27] in which he stated certain corrections which, in his judgment, should be made in the plan, including a modification or correction of the Old Colony purchase price to recognize in part the actual earnings of Old Colony for the years 1942 and 1943 in excess of the estimates for those years used by the parties negotiating the Old Colony purchase price. The District Court considered it had authority to order such corrections, but intimated that it would welcome a further report by the Commission, on its own motion, covering the suggested modifications.

However, the District Court entered no order at that time approving or disapproving the plan. Instead, and without returning the proceedings to the Commission, it accepted the Fifth Supplemental Report and Order made by the Commission "of its own motion," upon the "invitation of the Court" and without notice or hearing.[28] This Report, in addition to embodying the suggestions of the Court with respect to a modification upwards of the purchase price for the Old Colony properties, added to the plan the following new provision, referred to as section U (3), which provides: [29]

> "(3) That, should the judge determine, after due notice and hearing, that the provisions of this plan in respect to the reorganization of Old Colony are, because of opposition of other than New Haven parties or interests, such as to delay unreasonably and unnecessarily the reorganization of the principal debtor, he may in his discretion, set such provisions aside and consider and act upon the plan for reorganization of

[27] 54 F. Supp. 595 (1943), Prior S.C. R., vol. A, Ex. 12, p. 10695.
[28] 257 I.C.C. 9 (1944), Stip. R. I, No. 1, p. 10831.
[29] *Op. cit.*, 58; Stip. R. I, No. 1, p. 10922.

the principal debtor and the secondary debtors other than Old Colony."

On March 6, 1944, after hearing objections to the plan as thus modified and contained in the Fifth Supplemental Report, the District Court rendered its opinion [30] approving the plan and entered its decree in accordance therewith, Order No. 734.[31]

Thereupon your petitioners, among others, filed their notice of appeal from Order No. 734, as well as from Order No. 736 classifying creditors. However, before these appeals were perfected, the comprehensive plan thus approved was submitted to the creditors of the principal and secondary debtors for their acceptance or rejection, and on December 29, 1945, the Commission certified that the plan had been accepted by all classes of creditors voting excepting only the Housatonic bondholders and the bondholders of Old Colony. The Summary of Certificate [32] shows that, of the some $10,000,000 face amount of Old Colony bonds held by the Commission to have been validly voted, more than a majority thereof, $5,044,000, *rejected* the plan.

While the foregoing vote was in process, arguments on the various appeals from Order No. 734 were heard and on January 2, 1945, the Circuit Court of Appeals for the Second Circuit rendered its decision (147 F. 2d, 40), upholding the appeal of this Committee from, and *reversing*, Order No. 734 of the District Court purporting to approve the plan of reorganization for the principal debtor and secondary debtors as contained in the Fourth and Fifth Reports and Orders of the Interstate Commerce Commission.

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[30] 54 F. Supp. 631 (1944), Prior S.C. R., vol. A, Ex. 16, p. 11024.
[31] Stip. R. II, No. 21, p. 1, D. R. 11050.
[32] C.C.A. R., Ex. , D. R. 11516.

The plan for Old Colony thereupon became "twice-rejected"—once by the creditors of Old Colony and once by the Circuit Court of Appeals.

The Circuit Court of Appeals found that the purchase price for the Old Colony properties, franchises and assets fixed in those reports and orders was not founded upon an exercise by the Commission of its independent judgment in the vital matter of value, and that it was persuaded to approve the substantially reduced price solely because of the fact of purported compromise. The Court said:[33]

> "We conclude that the District Court's order of approval (#734) must be *reversed* so that the Commission may make its own independent findings of value and *price*. It is possible of course that the Commission may still adhere to figures which are the same as those of the Joint Report. Such correspondence would not in itself invalidate the Commission's conclusions if it *'shall state fully the reasons for its conclusions'* as required by section 77, sub. d, and such reasons are not the pressure exerted by the compromise." (Emphasis supplied.)

On January 30, 1945, Mandate No. 107 of the Circuit Court of Appeals was entered reversing Order No. 734 on the appeal of your petitioners, and affirming it as to all other appeals with one exception, but with leave to the District Judge "to remand to the Commission all or any portions of the plan if in his opinion it is desirable to have the Commission consider further any provisions of the plan *in addition to those affecting Old Colony.*"[34] (Emphasis supplied.)

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[33] 147 F. 2d, 40, 50.

[34] Stip. R. II, No. 22, pp. 17, 18.

On February 13, 1945, the District Court entered its Order No. 792, entitled "Order of Reference,"[35] referring the comprehensive plan back to the Commission, "but only for the following purposes:

> "(1) For such further action with respect to the *price to be paid* for the Old Colony property as may be required by said Opinions and Mandate;
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> "(2) For such further action, if any, as the Commission in its discretion may decide to take with respect to Section N(2) and N(3) of the plan; and
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> "(3) For such adjustments, if any, as the Commission may deem necessary as a result of its action under Paragraphs (1) and (2) hereof." (Emphasis supplied.)

On March 15, 1945, your petitioner filed with the Commission its Petition for Hearing, but on May 14, 1945, the Commission certified to the District Court its Sixth Supplemental Report and Order,[36] denying said Petition for Hearing and approving the *precise* purchase price for the Old Colony properties based on the Joint Report and approved in its previous Fourth and Fifth Supplemental Reports and Orders. This is the final Report made by the Commission in these proceedings and is the Report which, with the decisions of the District and Circuit Courts hereinafter referred to, gives rise to many of the questions posed in this petition.

The Commission concluded:[37]

> "That the provisions of the plan as approved in the Commission's reports and orders of July 13, 1943 and

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[35] Stip. R. I, No. 2, p. 11582.
[36] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, pp. 11682, 11684.
[37] *Op. cit.*, 210, Stip. R. I, No. 3, p. 11703.

February 8, 1944 [38] relating to the *price to be paid* for acquisition of the property of the Old Colony Railroad Company, and the Sections N(2) and N(3) of said plan, be and they are hereby approved." (Emphasis supplied.)

On May 25, 1945, the District Court entered its Order of Notice of Hearing on Confirmation of Plan (Order No. 804),[39] providing for the filing of "objections to the approval of said Sixth Supplemental Order of the Commission and any objections to the confirmation of said plan."

On June 22, 1945, this Committee filed such objections, and on July 2, 1945, argued orally and filed its brief in support of such objections.

On June 30, 1945, just two days prior to the foregoing hearing, the Circuit Court of Appeals, in a proceeding instituted by your petitioner contesting the validity of the District Court's Order of Reference, rendered its decision [40] approving that Order, but stating that—

> "If having regard to all the circumstances the statute requires a further hearing and none was had, as the appellants assert, that objection as well as any others to the validity of the sixth supplemental report can be presented to the district judge when the report comes before him, and upon appeal should one follow. The prior appeal decided nothing except that the Commission had not made independent findings of value and of *price* and the statute requires that it should. *Hence the Commission's new report will be subject to attack upon any legal ground when it comes before the district court.*" (Emphasis supplied.)

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[38] The Fourth and Fifth Supplemental Reports of the Commission.
[39] Stip. R. I, No. 4, p. 11711.
[40] 150 F. 2d, 169, 170, Stip. R. No. 5, p. 11825.

On August 31, 1945, the District Judge entered his "Memorandum of Decision on Sixth Supplemental Order and on Confirmation of Approved Plan."[41] After reviewing certain of the objections of this petitioner to the Old Colony purchase price purportedly approved by the Commission in its Sixth Supplemental Report, and those relating to the vote of the Old Colony bondholders rejecting the plan, the decision concludes:[42]

> ". . . that there is nothing in the Sixth Supplemental Report and Order when read in the light of the underlying evidence of record to require me to revise the approval *heretofore* recorded of the plan proposed for the Old Colony as contained in the Fifth Supplemental Order and now confirmed and reiterated in the Sixth." (Emphasis supplied.)

On September 6, 1945, Order No. 821,[43] purporting to "reinstate" Order No. 734, which had been reversed on appeal, was entered; and on the same day, without notice or hearing and without any submission of the plan certified in the Sixth Report and Order to a vote of creditors, the plan was confirmed by Order No. 822.[44]

Order No. 821, entitled "Order on Sixth Supplemental Order of the Interstate Commerce Commission," provides as follows:[45]

> "A certified copy of the Sixth Supplemental Report and Order of the Interstate Commerce Commission, dated May 14, 1945, in its Finance Docket No. 10992, having been duly filed herein, and a hearing thereon

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[41] Stip. R. I, No. 11, p. 11891.
[42] *Op. cit.*, 11903.
[43] Stip. R. I, No. 12, p. 11922.
[44] Stip. R. I, No. 13, p. 11924.
[45] Stip. R. I, No. 12, p. 11922.

and on objections thereto having been had after due notice to all parties in interest, and the Court having filed its opinion herein on August 31, 1945, and being duly advised in the premises, it is ORDERED:

"That the record of this Court in the proceedings upon a plan be enlarged to include said Sixth Supplemental Report and Order of the Interstate Commerce Commission together with all evidence received at the hearing herein and that the order of this Court of March 6, 1944 (Order No. 734) approving the plan as contained in the Fifth Supplemental Order of the Commission, *being consistent with the requirements of the appellate opinions of January 2, 1945 and January 23, 1945 147 Fed. (2d) 40, and with the appellate mandate of January 30, 1945, in the light of the record as thus enlarged, in all respects be reinstated as an order of this Court in full force and effect.*" (Emphasis supplied.)

Order No. 822, entitled "Decree Confirming Plan of Reorganization," is a typical order of confirmation and need not be set forth in full herein. This decree confirms the plan as approved by Order No. 734, which was reversed on appeal and purportedly reinstated by Order No. 821, without any new vote by the creditors.

On October 4, 1945, your petitioners filed their Notice of Appeal from Order No. 821, from Order No. 734 as it may have been reinstated by Order No. 821, and from Order No. 822.

The Circuit Court of Appeals, after the filing of briefs and oral argument, entered on July 31, 1946, its Order requesting further argument and briefs upon specific questions addressed to the parties by the Court.[46]

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[46] Stip. R. II, No. 28, p. 89.

Following the filing of said further briefs and oral argument, the Circuit Court of Appeals on January 13, 1947, in a majority opinion by Judge Swan, and a concurring opinion by Judge Learned Hand, with Judge Frank dissenting (in part), affirmed [47] the Orders of the District Court Nos. 821 and 822 purporting to approve and confirm the comprehensive plan for all debtors including Old Colony. Judge Swan said: [48]

> "Since in the case at bar the plan contemplates a *sale* of Old Colony assets to the reorganized New Haven, the appellant argues that the Commission could not lawfully proceed as it did, but must follow the doctrine applied in *First Nat. Bank* v. *Flershem*, 290 U.S. 504, 527, under which 'A detailed appraisal must . . . be made of the Corporation's assets as of the date of the sale, based upon then values and the possibility of disposing of them in parcels, as well as an entirety.' " (Emphasis supplied.)

Judge Swan, after stating his reasons for rejecting this contention, asserted that, for valuation purposes, it made not "the slightest difference" that the plan provided for the transfer of Old Colony properties to the New Haven for a "price," and adopted a concept of the position of the Old Colony bonds in the reorganization which had never been suggested by any party, court or commission in any of these proceedings prior to this appeal to the Circuit Court. He stated: [49]

> "We agree with appellees' argument that the properties of the Old Colony are, for purposes of the plan, on the same footing with respect to the whole system

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[47] F. 2d, , Stip. R. I, No. 15, pp. 12655, 12685.
[48] *Op. cit.*, , Stip. R. I, No. 15, p. 12666.
[49] *Op. cit.*, , Stip. R. I, No. 15, p. 12667.

as are lines securing a divisional mortgage of New Haven."

Your petitioners, in the light of Judge Frank's dissent [50] addressed in part to the foregoing conclusion of the majority of the Court, and in the light of the doubts and uncertainties expressed by Judge Hand in his concurring opinion as to the correctness of the majority decision on other points, filed on January 24, 1947, their Petition for Rehearing,[51] of limited scope. The Court denied this petition on February 1, 1947, and on February 4, 1947, entered its Mandate accordingly. Subsequent to the filing of the opinions, the Circuit Court of Appeals filed a document entitled "Errata," [52] which modifies and corrects the opinions of Judge Swan and Judge Frank in some material respects.

Thereafter, in view of the complex record and the even more complex questions herein presented for your consideration, your petitioners petitioned this Court for an order extending the time for filing petitions for writs of certiorari to and including May 15, 1947. The petition was allowed and the order [53] entered on April 1, 1947, extending the time as prayed for.

The Assets of Old Colony.

Old Colony's *operating properties*,[54] which have been operated by the trustees of the New Haven "for the account of" Old Colony, consist of some 529 miles of road

[50] *Op. cit.*, , Stip. R. I, No. 15, p. 12691.
[51] Stip. R. I, No. 16.
[52] Stip. R. I, No. 17, p. 12765.
[53] Stip. R. II, No. 32, p. 117.
[54] Original Report of Commission, 239 I.C.C. 337, 342, 348 (1940), Prior S.C. R., vol. A, Ex. 1, pp. 7863, 7875, 7917.

radiating throughout southeastern Massachusetts and extending into southern Rhode Island. Including yard tracks and sidings, it owned 1006 miles of all track as of December 31, 1936. Its lines serve and in some instances provide the only rail service for such industrial communities as Boston, Quincy, Brockton, Plymouth, Fall River, New Bedford, Lowell and Lawrence, Massachusetts, and Newport, Rhode Island. It also provides transportation to and from the resort centers located along the southern Massachusetts coastline, including Cape Cod.[55] Old Colony, in addition to its connections with the New Haven, has direct connections to the north and west with the Boston & Maine Railroad at Fitchburg and Lowell, Massachusetts, and with the Boston & Albany Railroad at Framingham and Boston, Massachusetts. As of December 31, 1936, the Interstate Commerce Commission Bureau of Valuation found the original cost of the Old Colony operating properties to be $50,210,654, the cost of reproduction new $61,889,070, reproduction new less depreciation $41,154,756, and the value of land and rights to be $12,524,502.

Old Colony also owns the so-called Market Terminal properties in South Boston,[56] to which properties the Commission in its Sixth Report appears to accord a value over and above the value indicated for the operating properties just described. These terminals (not to be confused with the South Station passenger terminal of Boston Terminal Company) are leased to certain produce dealers through the medium of Boston Market Terminal Company,

[55] New England Transportation Company, a wholly owned subsidiary of the principal debtor, provides a competing bus and truck service in a large part of the Old Colony territory. Old Colony neither receives nor is credited with any of the earnings of this profitable operation.

[56] (First) Supplemental Report, 244 I.C.C. 239, 260, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8064.

a company controlled jointly by the New Haven Railroad and the dealers. Old Colony has no interest whatsoever in this company. It is said that over 80% of all produce delivered to Boston by rail and sold by receivers arrives initially at these terminals, that the annual value of such produce amounts to approximately $60,000,000, and that substantially all of it is transported over the lines of the New Haven.[57]

Old Colony's *non-operating properties* are composed of (1) the unsecured claim against the New Haven for breach of lease adjudicated by the District Court at $47,186,963,[58] from which adjudication an appeal is pending and kept alive by a stipulation to which your petitioners are not a party; (2) the suit against the Bankers Trust Company [59] for some $13,379,215, having a relation to the amount of the lease claim by virtue of Section L of the plan of reorganization, (3) the one-half stock interest in Union Freight Railroad,[60] which runs between the South and the North Stations along Atlantic Avenue, Boston, serving the docks and industries located there and otherwise providing a bridge line between the Boston & Maine and New Haven systems, and (4) the $3,600,000 of New Haven first and refunding bonds,[61] upon which interest has been paid during the pendency of these proceedings in an amount of

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[57] See complaint filed on October 15, 1946, by United States of America against New York, New Haven and Hartford Railroad Company and others, instituting proceedings in the District Court of the United States for the District of Massachusetts, Civil No. 6070, under Section 4 of the Sherman Anti-Trust Act.

[58] Sixth Supplemental Report, 261 I.C.C. 195, 205, Stip. R. I, No. 3, pp. 11682, 11696.

[59] *Op. cit.*, 205, Stip. R. I, No. 3, p. 11695.

[60] *Op. cit.*, 205, Stip. R. I., No. 3, p. 11695. The other one-half interest is owned by the Boston & Providence and would also be acquired by the principal debtor, if the offer of the plan to that road should be accepted.

[61] *Op. cit.*, 205, Stip. R. I, No. 3, p. 11695.

$1,080,000 to August 31, 1945, and placed on special deposit in the Merchants National Bank of Boston.[62]

Item (1), the lease claim adjudicated at $47,186,963, is a claim against the New Haven estate growing out of the bankruptcy proceedings. In the absence of any plan to the contrary, this claim would participate in the New Haven reorganization as an unsecured claim to be satisfied with common stock of the reorganized New Haven in an approximate amount of 400,000 shares, or more than 40% of the total issue of common stock. From its nature it is not a part of the operating properties of Old Colony, and likewise, from its nature, need not of necessity be sold to the New Haven in protection of the public interest.

Item (2), the claim against the Bankers Trust, being against a third party, affects the disposition of Old Colony assets only because the New Haven is in turn required to indemnify the Bankers Trust for any loss it may suffer on account of this claim (Plan, Section L). Any amount recovered on this claim by the Old Colony should therefore go to reduce the amount recoverable from New Haven under the lease claim. These two assets, (1) and (2), may be further classified as unproductive in the sense that they have no earnings (except possibly interest). Item (3), the stock of the Union Freight Railroad, is an asset potentially salable to the Boston & Maine Railroad or other interests. Item (4), the $3,600,000 of New Haven first and refunding bonds, consists of listed securities having a current market value, which are capable of being disposed of in the open market.

These four non-operating assets of Old Colony bulk large in the total assets, are not necessary to the operation of its railroad system and are capable of separate appraisal and sale independently of its operating assets, and

[62] Stip. R. I, No. 11, pp. 11891, 11895-11896.

are not subject to the same considerations of public interest as are the operating properties.

Taking the values "*assigned*" by the Commission to the non-operating properties and the *maximum* values indicated by the Commission for the operating properties [63] and comparing them, the following results are obtained:

Non-operating Properties

(1) 1/2 stock Union Freight R.R.	$ 235,000
(2) Bankers Trust claim	3,250,000
(3) $3,600,000 New Haven bonds	2,010,000
(4) Unsecured lease claim	3,110,313
	$ 8,605,313

Operating Properties

(1) Railroad properties	$8,000,000
(2) Market Terminal properties	4,350,128
	$12,350,128

On this basis Old Colony's non-operating assets constitute over 41% of the whole and its operating assets less than 59% thereof.

Taking the "cash values" accorded the same assets by Judge Hincks in Note 4 of his Opinion dated August 31, 1945, entitled "A Permissible Valuation of Old Colony," [64] and similarly comparing them, the following results are obtained:

[63] Sixth Supplemental Report, 261 I.C.C. 195, 204-207, Stip. R. I, No. 3, pp. 11682, 11694-11700.

[64] Stip. R. I, No. 11, pp. 11891, 11915.

Non-operating Properties

(1) 1/2 stock Union Freight R.R.	$ 235,000
(2) Bankers Trust claim	3,250,000
(3) $3,600,000 New Haven bonds	2,010,000
(4) Interest accrued on above bonds and paid	928,000
(5) Lease claim	4,174,011
	$10,597,011

Operating Properties.

(1) Railroad property including Market Terminal properties	$3,399,040
(2) Excess value Market Terminals	1,776,412
	$5,175,452

Upon this basis the value of the operating properties amounts to less than 33% of the total value of all assets, with the non-operating assets constituting more than 67% thereof.

Old Colony's Liabilities.

The liabilities of Old Colony in the order of their priority, being those that constitute a lien upon these various assets,[65] consist of (1) the prior lien claim of the principal debtor taken by the Commission in its Sixth Report at $10,494,844 [66] and comprised of (*a*) $6,081,148, the loss *estimated* to have been sustained by the trustees of the

[65] Unsecured claims such as current liabilities are excluded from participation in the plan for Old Colony, as is its outstanding capital stock of $25,000,000 par value.

[66] 261 I.C.C. 195, 204, Stip. R. I, No. 3, pp. 11682, 11694.

principal debtor from their operation of the Old Colony properties "for the account of Old Colony" through December 31, 1943,[67] and (*b*) $4,413,796 of Boston Terminal Company (South Station) bond interest, Boston Terminal Company and Old Colony taxes, and administration expenses owed or claimed to be owed by Old Colony; and (2) the claim of the bonds of Old Colony, secured by a mortgage indenture upon its railroad properties and lease,[68] in the principal amount of $16,448,000, plus some $5,164,000 of interest accrued through December 31, 1943, or a total claim of approximately $21,612,000.[69]

The Plan for Old Colony.

The plan for Old Colony may be found in Section N of the comprehensive plan contained in the Fifth Supplemental Report and Order of the Commission.[70] It provides for the acquisition by the reorganized New Haven of all the Old Colony operating and non-operating properties described above, with the exception of the so-called Boston Group properties, which, according to studies made, have

[67] On July 18, 1938, the District Court entered its Order No. 300 adjudicating the amount of this claim for the period ending December 31, 1937. There has been no adjudication of the trustees' accounts for any subsequent period. Order No. 300 also reserved for later determination the question of interest upon the amount of this claim, but no such determination has been made.

[68] See petition of Old Colony Trust Company, Trustee for Old Colony R. Co. bonds, D. R. 1113.

[69] In its (First) Supplemental Report, 244 I.C.C. 239, 267-268, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8072, the Commission found that the claim of the Old Colony bonds for principal and interest accrued to December 31, 1939, was $19,655,683. It has made no finding as to the amount of this claim since that Report in 1941.

[70] 257 I.C.C. 9, 50, Stip. R. I, No. 1, pp. 10831, 10908.

contributed substantially to Old Colony's alleged recurrent deficits. The so-called Boston Group properties, largely commuter lines feeding Boston, would be retained by Old Colony, debtor, as its sole asset under a modified charter and a reduced capitalization equal to the salvage value of these properties, namely, $2,328,895. But the New Haven is given a free right of user of these properties both in passenger and in freight service, and is permitted, and under certain circumstances is required, to take over such properties, without payment of further considerations; and, under other circumstances, the Commonwealth of Massachusetts has the option to purchase the Boston-Braintree segment of the Boston Group properties at its salvage value, the consideration therefor being paid to the reorganized New Haven.[71]

The New Haven would pay for the diverse operating and non-operating properties of Old Colony (1) by cancellation of its prior lien claim taken at $10,494,844, and (2) by issue directly to the bondholders of Old Colony of $4,398,305 face amount of new first and refunding mortgage (fixed interest) bonds and $3,298,728 face amount of the new general mortgage (income) bonds, both of the reorganized New Haven; in such case, the authorized capitalization of the reorganized New Haven of $365,000,000 face amount of new securities is to be increased by the amount of the securities issued to the Old Colony bondholders.

The plan also includes the provision U(3), quoted above, authorizing the District Court in its discretion to eliminate from the plan all provisions for reorganization of Old Colony, if it considers that opposition of Old Colony or other interests not connected with the New Haven will

[71] The plan does not state a price for this segment of the Boston Group properties.

unreasonably and unnecessarily delay the reorganization of the New Haven.

Questions Presented for Certiorari.

The questions presented by this petition are:

1. Whether the proper legal standards applicable under Section 77 to valuation of the diverse operating and non-operating properties of one debtor (Old Colony) for purposes of their sale to another debtor (New Haven), under a plan of reorganization, are not different from the standards applicable when, as in the *Milwaukee* case, 318 U.S. 523, the purpose of valuation is to determine the relative values of divisional properties or liens within the approved system capitalization of a single debtor.
2. Whether the holding of the majority of the Circuit Court of Appeals that the valuation methods and standards of the *Milwaukee* case applicable to properties subject to divisional liens may lawfully and properly be applied to the valuation of the Old Colony properties in the circumstances of this case was not erroneous, and whether the Court should not have required the Interstate Commerce Commission to observe the valuation standards of Section 77(b)(5) as to fixing a "fair upset price" for a sale of the debtor's properties to the reorganized New Haven.
3. Whether the Commission was not required, by way of fixing a "fair upset price" under Section 77(b)(5) and in accordance with the underlying principles established in *First National Bank* v. *Flershem*, 290 U.S. 504, to find the fair cash value of each of the diverse operating and non-operating

properties of Old Colony, and the probable market or cash value of each class of the new New Haven securities to be given in payment for such properties under the plan of reorganization.

4. Whether, for purposes of the plan, treatment of the Old Colony properties as "on the same footing with respect to the whole system as are lines securing a divisional mortgage of New Haven," and implied treatment of the Old Colony bonds, as on the same footing as a New Haven divisional lien are not inconsistent with the position of this Court in *Palmer* v. *Webster & Atlas Nat. Bank,* 312 U.S. 156.

5. Whether, if the Old Colony properties, for purposes of the plan, are on the same footing as a division of the New Haven and the Old Colony bonds rank as a New Haven divisional lien, the plan for Old Colony is not unfair, inequitable, discriminatory, and in conflict with the principles of the *Milwaukee* case, 318 U.S. 523, in that the prior lien claim of the New Haven against the Old Colony, instead of being treated as a New Haven system obligation, is to be collected out of the Old Colony assets before the Old Colony bonds are permitted to participate in the capitalization of the reorganized New Haven.

6. Whether, if the Old Colony lines are, for purposes of the plan, on the same footing as a division of the New Haven and the Old Colony bonds rank as a New Haven divisional lien, the plan of reorganization is not unfair, inequitable, discriminatory, and in violation of the rule of the *Boyd* case, 228 U.S. 482, in failing to provide for the participation in the plan, with other unsecured New Haven creditors, of the excess of the $21,610,000 claim of the

Old Colony bonds for principal and accrued interest above the $7,697,033 face amount of new securities representing the net value, as determined by the Commission, of the *assets* securing the Old Colony bonds.

7. Whether, in operating the Old Colony lines as part of the New Haven system for forty-two years under the lease (rejected in the reorganization), the New Haven has commingled the assets and absorbed and dominated the management functions of its lessor-subsidiary to such extent that the New Haven assets cannot be insulated from claims of creditors of its subsidiary Old Colony, and, consequently, that the New Haven is responsible for obligations of its subsidiary (such as the Old Colony bonds) incurred or arising during the New Haven's management.
8. Whether the action of the Commission in reporting and approving, in its Sixth Supplemental Report and Order, the valuation and price provisions of the plan of reorganization as to Old Colony was not (*i*) arbitrary and capricious in view of its previous determinations and reports in the matter, or (*ii*) so deficient in its statement of the reasons for its conclusions, as to render it impossible for the Court to determine whether proper methods and legal standards were applied, so that, in either case, the return of the plan to the Commission for consideration under proper legal standards is required.
9. Whether the plan of reorganization reported in the Sixth Supplemental Report and Order is not materially defective, unfair and inequitable, because, on the face of the record, the Commission in its valuation of the Old Colony assets to be acquired by New Haven and of the price therefor, entirely omitted and failed to take into account a cash de-

posit representing interest impounded by the District Court on $3,600,000 first and refunding bonds of New Haven owned by Old Colony; or because the District Court has neglected to determine the validity and amount of the Old Colony's claim to this interest cash fund.

10. Whether, on the face of the record, the Commission failed in the Sixth Supplemental Report to apply proper legal standards by improperly deducting from Old Colony's unsecured claim for breach of lease the face amount ($13,000,000) of Old Colony's claim against Bankers Trust Company, instead of only $3,250,000, the value "assigned" by the Commission to this claim, thereby determining a net value for the unsecured lease claim so inadequate as to render the plan of reorganization unfair and inequitable with respect to Old Colony.

11. Whether the plan of reorganization reported in the Sixth Supplemental Report is not materially defective, unfair and inequitable, because the Commission—in applying (in lieu of cash) to payment of the New Haven's prior lien claim against Old Colony the new securities distributable under the plan upon the $3,600,000 of New Haven first and refunding bonds owned by Old Colony, and upon its unsecured claim for breach of lease—failed to make its own independent finding of the probable market or cash values as of December 31, 1943, of the new New Haven securities distributable on such claims; or because the Commission, if it did find such values, based its findings on wholly insubstantial and obsolete evidence.

12. Whether, after the Joint Report was filed with it, the Commission was not required, under the provisions of Section 77(d) and (e), to hold hearings

for the reception of evidence and argument thereon, particularly with respect to the price to be paid for the Old Colony properties, first proposed in the Joint Report.

13. Whether—when the Circuit Court of Appeals (147 F. 2d, 40, and 150 F. 2d, 169), on the appeal of your petitioners, reversed the District Court's order approving the plan of reorganization reported in the Fifth Supplemental Report, leaving it to the District Court to remand either the entire plan or the Old Colony portion thereof to the Commission so that the Commission might make its independent determination of the value of Old Colony assets and the price therefor and state its reasons, and when the District Court remanded to the Commission the entire plan but for the limited purpose of such further action with respect to the price to be paid for the Old Colony properties as might be required by the decision of the Circuit Court of Appeals—the Commission was obligated to "hold public hearings" on the plan for Old Colony under Section 77(d) and (e), and acted unlawfully in denying the petition for such hearing filed on behalf of the Old Colony bondholders.

14. Whether the rejection of the plan of reorganization, approved in the Commission's Third, Fourth and Fifth Supplemental Reports and Orders, by the holders of a majority of the Old Colony bonds voting was not reasonably justified, in view of the subsequent determination of the Circuit Court of Appeals (147 F. 2d, 40) that said Report was fundamentally defective because the Commission had not exercised its independent judgment in approving the plan submitted to such bondholders.

15. Whether the provisions of Section 77(e) did not require that, prior to the confirmation by the District Court of the plan of reorganization based on the Commission's Sixth Supplemental Report and Order, the plan be submitted by the Commission to at least the Old Colony bondholders for acceptance or rejection.
16. Whether the "cram down" provisions of Section 77(e) authorizing a Court to confirm a plan of reorganization despite lack of acceptance thereof by creditors were sufficient authority to the District Court to confirm the plan of reorganization for the Old Colony, debtor, despite the fact that the plan was rejected by a voting majority of the *only* class of creditors of the debtor affected by and participating in the plan; and whether such provisions, if construed (as they have been by the Courts below) to authorize such action, violate due process of law under the Fifth Amendment to the Constitution.
17. Whether, upon the reversal by the Circuit Court of Appeals below (147 F. 2d, 40, and 150 F. 2d, 169) of the District Court's previous order approving the plan of reorganization for Old Colony, the District Court failed to comply with the applicable requirements of Section 77 in entering its Orders No. 821 and No. 822 approving and confirming the plan on the basis of and with respect to the Commission's Sixth Supplemental Report and Order, and whether the order of the Circuit Court of Appeals below affirming such orders should not be reversed.

Specification of Errors.

The Circuit Court of Appeals below erred—

(1) In affirming Order No. 821 of the District Court enlarging the record to include the Sixth Supplemental Report and "reinstating" its Order No. 734, which approved the plan as reported in the Fifth Supplemental Report; and in affirming Order No. 822 of the District Court confirming the plan of reorganization referred to in the Sixth Supplemental Report of the Commission. (See Question 17.)

(2) In holding that the Commission applied proper legal standards, properly considered each element of value and did not wrongly decide legal questions as to valuation of assets and allotment of securities, in respect to the plan of reorganization for the Old Colony. (See Questions 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 13.)

(3) In holding that the plan does not provide for a sale to the reorganized New Haven of the assets of Old Colony, debtor, such as to require fixing a "fair upset price" therefor under Section 77(b)(5). (See Questions 1, 2 and 3.)

(4) In holding that the Old Colony properties, for purposes of the plan, are on the same footing as are lines of New Haven securing a divisional mortgage, and that the valuation principles of the *Milwaukee* case therefore apply to valuation of the Old Colony properties and the compensation for the Old Colony bonds. (See Questions 1 and 2.)

(5) In holding that, on the assumption that the Old Colony bonds may properly be treated on the footing of a divisional lien of New Haven, the plan of reorganization is fair and equitable as to Old Colony, and the legal standards of the *Milwaukee* case as to full compensatory treatment of the Old Colony bonds have been properly applied

by the Commission and the District Court. (See Questions 4, 5, 6, 9, 10 and 11.)

(6) In holding that the Commission did properly take into account as an asset of Old Colony the interest, held in special deposit, on $3,600,000 first and refunding bonds of New Haven owned by Old Colony. (See Question 9.)

(7) In holding that the Commission did set off to a proper extent the Bankers Trust claim of Old Colony against the Old Colony's claim for breach of lease, in determining the net value of the breach of lease claim. (See Question 10.)

(8) In holding the plan of reorganization of Old Colony fair and equitable, and in compliance with Section 77. (See Questions 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11.)

(9) In holding that the Commission in its Sixth Supplemental Report did exercise its own independent judgment as to the valuation of and price for the Old Colony, and adequately stated its reasons for fixing such price at exactly the figure determined by representatives of the New Haven and its creditors in the Joint Report. (See Question 8.)

(10) In holding that the Commission was not required by Section 77 to hold hearings upon the elements of the plan presented by the Joint Report, after the Joint Report was filed in April, 1942. (See Question 12.)

(11) In holding that the Commission was justified in refusing your petitioners a hearing either upon the elements of the plan remanded to the Commission, or upon changes in the situation, after the order of the District Court approving the plan presented by the Fifth Supplemental Report had been reversed in part by the Circuit Court of Appeals (147 F. 2d, 40). (See Question 13.)

(12) In holding that the plan reported in the Sixth Supplemental Report need not be submitted for acceptance or rejection, at least by the Old Colony bondholders, prior to

confirmation of such plan by the District Court; and that the prior submission of the plan reported in the Fifth Supplemental Report was valid and sufficient, although such plan was subsequently held invalid by the Circuit Court of Appeals (147 F. 2d, 40) on the ground that the Commission had not exercised its independent judgment as to the valuation of and price for Old Colony. (See Questions 13 and 14.)

(13) In holding that the Old Colony bondholders were not reasonably justified in rejecting the plan which the Circuit Court of Appeals subsequently held invalid on the ground that the Commission had not exercised its independent judgment as to the valuation of and price for Old Colony. (See Question 14.)

(14) In holding that the District Court was justified, and acted in compliance with due process of law, in confirming the plan for reorganization of Old Colony in spite of the rejection thereof by the holders of a majority of the Old Colony bonds voting, being the only class of creditors of Old Colony, debtor, affected by and participating in the plan. (See Question 16.)

Reasons for Granting the Writ.

I. *Question 1* presents for determination a question which is basic to the plan of reorganization for Old Colony. All the decisions of this Court which have laid down the proper standards of valuation by the Interstate Commerce Commission under Section 77 have dealt with the valuation of divisional lien claims based on divisions of a single debtor's railroad lines. *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 87 L. ed. 892. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U.S. 523, 558, 87 L. ed. 959, 1004. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W. R. Co.*,

U.S. , 90 L. ed. 1134, 1145. (In the *Milwaukee* case, the Terre Haute lessor was not in reorganization.)

As stated in the *Rio Grande* case (p. 1146), there must be an "allocation of securities representing the *system value* to each class of [divisional] claimants." (Emphasis supplied.) The purpose is to retain the "*relative* priority of position" of the senior creditors in the reorganization, and to assure full compensation in order of seniority.

The purpose of valuation is quite different in the case of an independent railroad such as the Old Colony, the properties of which are to be sold to another railroad, such as the New Haven. The Old Colony is an independent corporate entity; and, since its lease to New Haven was rejected by the New Haven trustees and its stock (held by the New Haven and the public) declared worthless by the Interstate Commerce Commission, the New Haven has no interest of any kind in the Old Colony's properties. Old Colony's separate position is emphasized by the fact that some of its most valuable assets have arisen from the reorganization itself—that is, the Old Colony claims against the New Haven, debtor, and against the Bankers Trust Company, arising out of the rejection of its lease to New Haven. Likewise, a prior lien claim of the New Haven trustees against the Old Colony has arisen from the operation of the Old Colony lines by the New Haven trustees "for the account of" the Old Colony during the reorganization proceedings.

In such circumstances, it appears that the purpose of valuation is either (1) to fix a price to be offered by the reorganized New Haven for the Old Colony, which the Old Colony interests may freely accept or reject (as in the matter of the Terre Haute lines in the *Milwaukee* case); or (2) to determine the fair value of and price for the Old Colony properties, if to be acquired by the reorganized New Haven under a plan. But, in such latter case, the

objective of valuation is an *absolute* fair value, without reference to such considerations of *relative* position as apply to divisional liens.

Whether the foregoing distinction between the valuation standards for divisional properties and claims and the standards for acquisition of former leased lines and other properties of an independent debtor is a sound distinction, and, if so, what are the proper valuation standards applicable in the latter case, are questions which have not been settled by this Court, but should be, in the interest of efficient conduct of reorganizations under Section 77.

II. *Question 2* presents one of the basic conflicts of opinion with respect to the valuation of the Old Colony properties for the purposes of the plan of reorganization referred to in the Sixth Supplemental Report and Order of the Interstate Commerce Commission,[72] and with respect to the treatment accorded the Old Colony bonds in the plan.

The majority of the Circuit Court of Appeals for the Second Circuit have taken the position [73] that, if the Interstate Commerce Commission has applied valuation methods or standards for this purpose sufficient to comply with the standards established in the *Milwaukee* case [74] for valuation to establish the participation of divisional liens of a railroad system, the provisions of the plan with respect to Old Colony cannot be disturbed.

In addition to the principles set forth under I, above, which are equally applicable here, your petitioners represent (*i*) that the plan itself, and all prior proceedings of the Commission and the Courts up to the decision of the

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[72] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, p. 11682.

[73] F. 2d, , Stip. R. I, No. 15, pp. 12655, 12667.

[74] Institutional Investors v. Chicago, Milwaukee, St. P. & P. R. Co., 318 U.S. 523, 87 L. ed. 959 (1943).

Circuit Court of Appeals of which review is now sought, have consistently dealt with the Old Colony Railroad as an independent entity, and with the proposed transfer of its assets to the reorganized New Haven as a sale, and (*ii*) that consequently the Commission was required in effect to fix a "fair upset price" for the properties under the provisions of Section 77(b)(5) relating to sales; and further (*iii*) that fixing of a "fair upset price" required the Commission to find the fair cash sale value of the Old Colony properties and the probable market values of the new New Haven securities to be exchanged therefor or applied to satisfaction of the prior lien claim—findings which the Commission has not made. This was the basis, in part, of the dissenting opinion [75] in the Circuit Court of Appeals below. The majority of the Circuit Court of Appeals consider the "fair upset price" provisions as optional, at best.

This Court has not heretofore determined under Section 77 the question whether—in a case like that of Old Colony, which is a subsidiary of New Haven, a secondary debtor in the same reorganization proceedings, the lessor of an unexpired lease rejected by the trustees of the lessee New Haven, and a company whose lines are being operated by the lessee's trustees involuntarily for the account and risk of the Old Colony—the valuation methods or standards applicable are those established in the *Milwaukee* case for divisional liens or, on the contrary, are those necessary to determine a "fair upset price" for a sale under Section 77(b)(5).

Whether the principles of valuation of the properties of a former lessor and co-debtor as stated by the Circuit Court of Appeals majority are correct is a question of importance to the administration of the railroad reorganiza-

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[75] F. 2d, , Stip. R. I, No. 15, pp. 12691, 12699-12700.

tion provisions of the Bankruptcy Act, upon which even the Circuit Court of Appeals for the Second Circuit is internally divided, and which has not been settled by this Court, but should be in the interests of proper administration of Section 77.

III. *Question 3* more specifically raises the same questions as to the application of the "fair upset price" provisions of Section 77(b)(5) argued in the dissenting opinion [76] filed in the Circuit Court of Appeals below. The application of these provisions, at least to a sale by a debtor in the position of Old Colony, presents a question of first impression and of great importance, on which again the Circuit Court of Appeals is divided, and which has not been settled by this Court, but should be.

The statutory provision in Section 77(b) here referred to is:

> "A plan of reorganization . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, . . ."

As stated above in II, Judge Swan has said,[77] for the majority of the Circuit Court of Appeals below, that the provisions of Section 77(b)(5) as to upset price are "optional, not mandatory," as to any property which passes *to* the debtor or to the new reorganized company, referring to the reorganized New Haven under this plan. This views the provision from the wrong angle, that of the purchaser; the upset price provision of subsection (b)(5) applies to sales *by* the debtor, in this case the Old Colony. Subsection (b)(5) does provide a choice of meth-

[76] *Op. cit.*, , Stip. R. I, No. 15, pp. 12691, 12699.
[77] F. 2d, , Stip. R. I, No. 17.

ods for execution of the plan; but, if a "sale of all or any part of the property of the debtor" is the method chosen, as in this plan, there is no option given as to whether such sale shall be "at not less than a fair upset price."

The principles of valuation applicable to determination of an upset price are set forth in *First Nat. Bank* v. *Flershem.*[78]

Since, as pointed out in I, above, the New Haven now has no interest in the *property* of the Old Colony, a *sale* is essential, if the New Haven is to acquire such property. Under the statute, such a sale requires that a "fair upset price" be fixed. This neither the Commission nor the Court has attempted to do.

IV. *Question 4* presents the point that the decision of the majority in the Circuit Court of Appeals below is probably in conflict with the decision, or the underlying basis of the decision, of this Court in *Palmer* v. *Webster & Atlas Nat. Bank.*[79] This doubt on an important issue should be resolved. The Circuit Court of Appeals in its majority decision below is the first Court or commission to take the position that the plan of reorganization with respect to the acquisition of the Old Colony assets by the reorganized New Haven does not in fact and substance provide for a *sale* by the Old Colony, and to hold instead that the transfer from one corporation to the other is a mere formality and, in effect, that the mortgage bonds of the Old Colony are in the same status for purposes of reorganization and valuation as any divisional lien of the New Haven.

On the other hand, this Court, in *Palmer* v. *Webster & Atlas Nat. Bank,* held that the New Haven trustees, in

[78] 290 U.S. 504, 527, 78 L. ed. 465, 479 (1934).
[79] 312 U.S. 156, 85 L. ed. 642 (1941).

operating the Old Colony lines, after the rejection of the Old Colony lease under Section 77, were not conducting the business of the Old Colony lines but merely operating them to prevent public inconvenience; and that the New Haven trustees in operating the Old Colony lines for the account of Old Colony were not, of course, obligated to pay the debts of the Old Colony nor to advance New Haven funds without security, nor to pay obligations unless incurred as essential to the continued operation of the railroad. This decision appears to be founded clearly on the conception that, upon the rejection of this lease by the New Haven, the Old Colony became a distinct entity and subject to all risks of business loss, although for public convenience its lines were operated by others under Court order. This concept is confirmed by the orders of the District Court, and of the Circuit Court of Appeals for the Second Circuit [80] which established operating losses incurred by the New Haven trustees in operating the Old Colony lines under the jurisdiction of the Court for the account of Old Colony as claims against the separate Old Colony estate constituting a prior lien, the New Haven trustees being subrogated to the rights of the suppliers of goods or services. Such prior lien claim, amounting to some $10,500,000 as of December 31, 1943 (covering operating losses, taxes, Boston Terminal charges and the Old Colony's reorganization expenses), is treated as a first charge upon the Old Colony assets in the plan of reorganization.[81] See Frank, J., dissenting in Circuit Court of Appeals below.[82]

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[80] Palmer v. Palmer, 104 F. 2d, 161 (1939).

[81] 261 I.C.C. 195, 204, 207 (1945), Stip. R. I, No. 3, pp. 11682, 11694, 11698.

[82] Stip. R. I, No. 15, pp. 12691-2, 12697-8, and No. 17, p. 12765.

Your petitioners submit that the decision below to treat the Old Colony bonds as a divisional lien of the New Haven, and subject to the same valuation standards, appears to be plainly in conflict with the views of this Court, as expressed in the case referred to above, and that the question is fundamental to any consideration of the fairness and equitableness of the plan of reorganization with respect to the Old Colony.

V. *Question 5* points out one striking inconsistency in the treatment of the Old Colony in the plan of reorganization, if the position of the Circuit Court of Appeals majority discussed under II, above, is allowed to stand. If the Old Colony bonds have no status in the reorganization other than that of a divisional lien of the New Haven, and if *also,* as the plan provides, the compensation to be given such Old Colony "divisional" bonds is to be reduced by the flat deduction of the prior lien claim totaling some $10,500,000 in the aggregate,[83] the resulting participation of the Old Colony bonds in the reorganization has not been determined by the application of proper legal standards as prescribed by this Court in the *Milwaukee* case.[84] To hold that the rights of the Old Colony bondholders with respect to valuations of their interest and participation in the plan are on the same footing as the rights of New Haven divisional lien holders, and at the same time to hold that the Old Colony is to be independently charged on a segregated basis for operating losses and administrative charges, as no other New Haven divisional lien holders have been, is, from the standpoint of the New Haven, a clear case of "eating your cake and having it too," and,

[83] Sixth Supplemental Report, 261 I.C.C. 195, 204, 207. Stip. R. I, No. 3, pp. 11682, 11694, 11698.

[84] 318 U.S. 523, 87 L. ed. 959 (1943).

for that reason, in conflict with the decisions of this Court in the *Milwaukee* and other cases. See Judge Frank, dissenting below.[85]

VI. *Question 6* raises the question of another inconsistency in the plan of reorganization, if the Old Colony properties are, as the Circuit Court of Appeals majority hold, on the footing of a division of the New Haven and the Old Colony bonds are treated as a divisional lien of New Haven. On that basis, the claim of the Old Colony bonds against the New Haven estate would consist of the total principal plus accrued and unpaid interest to the "cut-off" date, which has been treated as December 31, 1943, for Old Colony.

The Commission in its (First) Supplemental Report[86] established the amount of the Old Colony bonds claim as of December 31, 1939, as $16,448,000 face amount plus unpaid interest to that date to make a total claim of $19,655,683. We compute the additional interest to December 31, 1943, to make the total claim of the Old Colony bonds approximately $21,612,000.

The Sixth Supplemental Report[87] of the Commission purports to measure the distribution of new securities distributable under the plan in satisfaction of the Old Colony bonds exclusively by the Old Colony's *assets* (which are, wholly or partly, only the security for the bonds), instead of by the amount of the *claim* of the bonds, as would be the case if the Old Colony bonds were on the same footing as New Haven divisional liens. The portion of the bond claim not compensated by the plan may amount to as much

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[85] F. 2d, , Stip. R. I, No. 15, pp. 12691, 12697.

[86] 244 I.C.C. 239, 267-268 (1941), Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8072.

[87] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, p. 11682.

as $14,000,000, as shown in detail in the accompanying Brief on this question (page 4).

In the *Milwaukee* case [88] this Court directed the District Court to "determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights." The Old Colony bonds assuredly do not receive under the plan any *other* form of compensation for the loss of their senior rights. Neither the Commission nor the District Court discusses compensatory treatment on the basis of the face amount of the Old Colony bond claim, as they failed to do in the *Milwaukee* case also.

For these reasons also, if the divisional lien theory is allowed to stand, the plan is unfair and inequitable as to the Old Colony. This Court should enforce the application of proper legal standards in that respect.

VII. *Question 7* raises the question whether the decision of this Court in the *Consolidated Rock Products* case,[89] with respect to the right of creditors of the subsidiary companies there to claim against the parent, does not likewise apply in the case of domination and commingling of assets by an operating railroad lessee (and parent) with respect to a non-operating lessor (and subsidiary). This doctrine is distinct, in theory, from the divisional lien theory advanced by the Circuit Court of Appeals below, but the results with respect to the $21,612,000 claim of the Old Colony bonds would be similar (see VI, above).

Prior to its lease to New Haven in 1893, Old Colony was an operating railroad, conservatively capitalized and pro-

[88] 318 U.S. 523, 571, 87 L. ed. 959, 1010 (1943).

[89] Consolidated Rock Products Co. v. DuBois, 312 U.S. 510, 523-524, 85 L. ed. 982, 992 (1941).

gressively managed, with connecting outlets to the west and north *via* the Boston & Maine system and the Boston & Albany, as well as to the south *via* the New Haven, and with a profitable connection with New York City through its own subsidiary steamship line, so that it was in no way dependent on the New Haven. During the period of the lease the Old Colony lost its operating organization, its equipment, its steamship line and its own terminals in Boston.[90]

The application of the *Consolidated Rock Products* doctrine to a situation like Old Colony's has not been settled by this Court, but should be, in the interest of efficient administration of railroad reorganizations under the Bankruptcy Act.

VIII. *Question 8* presents the question whether the Commission, in its Sixth Supplemental Report and Order with respect to the plan of reorganization of the Old Colony, exercised its own independent judgment in establishing the value of the Old Colony assets to be sold to the reorganized New Haven, and the price to be paid therefor.

(*a*) That it did not exercise its independent judgment is crushingly demonstrated in the last portion of the dissenting opinion [91] in the Circuit Court of Appeals below. On Judge Frank's argument on this point your petitioners rely.

It must be taken into account that, when the same provisions of the plan were earlier before the Circuit Court of Appeals, that Court ordered the Old Colony portions of the plan remanded to the Commission because, in the judg-

[90] Commissioner Eastman's dissent to Original Report of the Commission, 239 I.C.C. 337, 446, 447 (1940), Prior S.C. R., vol. A, Ex. 1, pp. 7863, 7994; and (First) Supplemental Report, 244 I.C.C. 239, 258, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8061-8062.

[91] F. 2d, , Stip. R. I, No. 15, p. 12708.

ment of the Circuit Court of Appeals, the Commission had approved the plan in its Fifth Supplemental Report and Order "for fear that any material modification of it [the compromise of the Joint Report] would be unacceptable to the parties and would result in delay in consummation of the reorganization." The Circuit Court of Appeals therefore directed [92] the Commission to make its own independent findings of value and price, *and to state its reasons therefor* as required by Section 77(d).

(*b*) Even if the Commission had not to overcome, as argued in the dissenting opinion in the Circuit Court of Appeals below, the onus of approving again the exact valuation figure which it had previously approved for legally improper reasons, the Commission's Sixth Report [93] is so confused that it is impossible in many respects to find a statement of its reasons for approving the plan a second time, or to determine whether it applied proper legal standards or not.

In sum, we submit that the Sixth Report, when read in the light of the prior Reports on the same plan, shows on its face that the approval of the plan as to Old Colony was arrived at capriciously and arbitrarily; and also that the Sixth Report is so deficient in its statement of reasons for the Commission's conclusions, required by Section 77(d), as to afford no adequate basis for determining whether or not proper legal standards were in all respects observed. The remarks of this Court in the early *Milwaukee* decision [94] are equally applicable here: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

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[92] 147 F. 2d, 40, 49.

[93] 261 I.C.C. 195 (1945), Stip. R. I, No. 3, p. 11682.

[94] United States v. Chicago, Milwaukee, St. P. & P. R. Co., 294 U.S. 499, 510-511, 79 L. ed. 1023, 1031 (1935).

IX. *Question 9* makes the point that the Commission in its valuation of the Old Colony assets to be acquired by New Haven under the plan completely ignored a cash deposit claimed by Old Colony, representing interest paid on $3,600,000 face amount of New Haven first and refunding bonds owned by Old Colony; and also that the District Court has never adjudicated Old Colony's right to this asset, amounting to $792,000 at December 31, 1943 (and since increased to over $1,000,000), but has kept these interest payments impounded in a special bank account "pending further order of this court." [95]

Until the Old Colony's title to this cash deposit is adjudicated, no plan which omits it as an Old Colony asset can comply with the proper legal standards. This Court has remanded plans of reorganization to the District Court for similar deficiencies—as in the *Consolidated Rock Products* case,[96] for determination of what assets were subject to the subsidiary debtors' mortgages, and in the *Milwaukee* case,[97] for the determination of the lien of the General Mortgage bonds on the "pieces of lines east." In the latter decision, at p. 569: ". . . the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute."

The detailed proof, from the Sixth Supplemental Report itself, that the Commission entirely failed to credit the Old Colony with this asset of interest on deposit is set forth in your petitioners' Brief (page 9) on this question.

In conclusion, this Court should consider (1) whether the Commission in its valuation of Old Colony assets to be acquired by New Haven completely omitted this substan-

[95] Stip. R. I, No. 11, pp. 11891, 11895-11896.
[96] 312 U.S. 510, 520, 85 L. ed. 982, 990.
[97] 318 U.S. 523, 568-569, 87 L. ed. 959, 1009.

tial asset of cash interest on deposit, and consequently understated the equivalent price for the Old Colony properties, thereby rendering the plan unfair and inequitable with respect to Old Colony; and (2) whether the validity and amount of the Old Colony's claim to interest on these New Haven bonds must not be determined by the District Court before the Commission can properly propose a plan. On either basis, the plan must be returned to the District Court and the Commission.

X. *Question 10* points out a second instance of improper valuation of the Old Colony assets by the Commission, which can be demonstrated on the face of the record in the Sixth Supplemental Report.[98]

The rather involved facts in the record on which this question is based are set forth in your petitioners' Brief on this question, where it is demonstrated, from the Sixth Supplemental Report itself, that the Commission erroneously applied some $10,100,000 too much in reduction of the Old Colony's lease claim. The District Court conceded [99] that the Commission applied improper legal standards in so doing, if it made a reduction in that excessive amount, but the judge misinterpreted the language of the Sixth Report, as did the Circuit Court of Appeals, in finding that the Commission had not done so. The statements showing the error on the face of the Report are plain to see, as your petitioners' Brief (page 17) points out.

XI. *Question 11* raises another question as to the proper performance of its functions by the Commission in its Sixth Supplemental Report.

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[98] 261 I.C.C. 195, Stip. R. I, No. 3, pp. 11682, 11695, 11698.
[99] Stip. R. I, No. 11, pp. 11891, 11894.

The plan with respect to Old Colony provides for cancellation of the New Haven's prior lien claim of some $10,500,000 against the Old Colony before payment for the Old Colony's remaining assets. The Sixth Report says:[100] "Thus, in effect, the prior-lien claim is to be considered part of the purchase price of Old Colony properties and assets, as also are the cash requirements to discharge claims against Old Colony." The Report then specifies, as items to be applied to payment of the prior lien claim, certain specific Old Colony assets or the new securities distributable for such particular assets under the plan.

Since the claim of $10,500,000 is a claim for cash, it is essential that the assets used in payment be given cash values. The Commission failed to make any finding of its own as to such cash or probable market values of the new securities to be used in payment of the prior lien claim, but instead used (without itself adopting) certain market values of such new securities estimated or guessed at by a single witness in February, 1942.[101] See Judge Frank's dissenting opinion in the Circuit Court of Appeals below,[102] discussing, though in a different connection, the necessity of a Commission finding of market values.

Further, the probable market values required for the plan should have been found by the Commission as of December 31, 1943, the valuation date for the Old Colony reorganization. Nearly two years intervened between the "expert" testimony on market values and the proper cut-off date, during which period prices of railroad securities rose substantially. Proper finding by the Commission of the probable market values as of December 31, 1943, would have reduced substantially the assets required for payment

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[100] 261 I.C.C. 195, 207, Stip. R. No. 3, pp. 11682, 11698.

[101] *The entire testimony on such values is set forth in* Stip. R. II, No. 29, pp. 107-111.

[102] F. 2d, , Stip. R. I, No. 15, pp. 12722-12725.

of the prior lien claim, and would have correspondingly increased the new securities distributable to the Old Colony bondholders. See your petitioners' Brief on this question (page 22).

In conclusion, this Court in the interest of the application of proper legal standards in Section 77 proceedings should determine whether the Commission failed to make its own independent findings of the essential probable market values, as of December 31, 1943, of the new securities applied to the satisfaction of the prior lien claim against Old Colony; and whether, if such findings were made by implication, they were based on evidence so meager and so out-of-date as to be unsupported by sufficient evidence.

XII. *Question 12* involves the proper construction of the following provision of Section 77(d):

> "Such plans [of reorganization] may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors . . . , or by or on behalf of any class of stockholders . . . , or with the consent of the Commission by any party in interest. *After the filing of such a plan,* the Commission . . . shall, after due notice to all stockholders and creditors given in such manner as it shall determine, *hold public hearings,* at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order . . ." (Emphasis supplied.)

The courts below appear to have sanctioned, in this instance, a departure from the accepted and usual, and the proper, course of procedure.

At the conclusion of its final hearings on this plan in February, 1942, the Commission's examiner [103] held open the record for the reception of the Joint Report and briefs, but held no further hearings. Since the Joint Report [104] contained substantially all the provisions of the plan for reorganization of Old Colony, including proposals on valuation of and price for its assets which had never been proposed before, and the Commission adopted the Joint Report plan, in substance, in its Third, Fourth, Fifth and Sixth Supplemental Reports,[105] a question, of great importance to the Old Colony bondholders at least, is raised as to whether the above-quoted provision of the statute did not require the Commission to reopen its hearings after receipt of the Joint Report.

On the latter point, the two sentences of Section 77(d) quoted above require interpretation, since the first sentence permits filing of a plan *during* a hearing (but only with the Commission's consent), while the second sentence requires a hearing *after* a plan has been filed. To give effect to both sentences would seem to require that, in case a plan is filed *during* a hearing, the hearing be continued *after* the plan is so filed. In the present case, by holding open the record after the hearings ended, the Commission may technically have arranged for the Joint Report plan to be filed "during" the hearing; but granting two weeks thereafter to file briefs was not the equivalent of giving a "hearing" *after* that plan was filed.

An opportunity to file briefs after the Joint Report was submitted was not the equivalent of a "hearing." *Mor-*

[103] Third Supplemental Report, 254 I.C.C. 63, 64, Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9754.

[104] Stip. R. II, No. 36, p. 133.

[105] (Third) 254 I.C.C. 63 (1942); (Fourth) 254 I.C.C. 405 (1943); (Fifth) 257 I.C.C. 9 (1944); (Sixth) 261 I.C.C. 195 (1945)—(Third, Fourth) Prior S.C. R., vol. A, Exs. 8 and 9; (Fifth, Sixth) Stip. R. I, No. 1, p. 10831; and No. 3, p. 11682.

gan v. *United States,* 298 U.S. 468, 480. *Morgan* v. *United States,* 304 U.S. 1, 18. Here, there was no opportunity to submit evidence, to cross-examine the proponents of the Joint Report plan or to argue orally on the merits of the proposed price for the Old Colony first put forward in the Joint Report. This Court should determine what constitutes a "hearing" under the provisions of Section 77(d).

XIII. *Question 13* involves the construction of the following provision in Section 77(d):

> "After the filing of such a plan, the Commission . . . *shall* . . . *hold public hearings,* at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, . . . or . . . refuse to approve any plan." (Emphasis supplied.)

In that connection, the following provisions of Section 77(e) are also pertinent:

> "If the judge shall not approve the plan, . . . he shall enter an order in which he may either dismiss the proceedings, or . . . refer the proceedings back to the Commission for further action . . . If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section."

The question here is whether this first quoted provision applies when a District Court order approving a plan has been affirmed in part but reversed in part with instructions that the whole plan or a specified part be remanded to the Commission for further action. In the Old Colony

case, upon partial reversal the District Court remanded the entire plan to the Commission but limited the purposes for which it was returned to the independent valuation of the Old Colony assets and the price therefor, the most important elements of the plan as to Old Colony. The Commission denied the petition of your petitioners here for public hearings, and held no hearings prior to making its Sixth Supplemental Report and Order.

The question here was not raised in or decided by *In re Chicago, Milwaukee, St. P. & P. R. Co.*, 145 F. 2d, 299.[106] Following this Court's previous decision [107] in the same reorganization, reversing in two particulars the order approving the plan, the plan was remanded to the Commission, which *did then hold hearings* and receive evidence with respect to those particulars of the plan (see 58 F. Supp. 384, 387), as your petitioners here contend the Commission should have done in the Old Colony case. (The questions raised in the later *Milwaukee* decision, 145 F. 2d, 299, were quite different, being concerned with the Commission's authority to change the plan in other respects, and its refusal to hear evidence offered to show subsequent changes in the debtor's economic situation.)

In the interest of efficient administration of many cases under Section 77, it is of importance that the effect of a partial reversal of an order approving a plan, and of partial remand of a plan to the Commission, and the application to such situation of subsections (d) and (e), be settled by this Court, and that an improper departure by the Commission from its own practices as to hearings (see the procedure reported in the District Court opinion, 58 F. Supp. 384, 387, cited above) should not be sanctioned by the lower Courts as in this case.

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[106] *Cert. denied*, 324 U.S. 857, 89 L. ed. 1415; *rehearing denied*, 325 U.S. 895, 89 L. ed. 2006.

[107] 318 U.S. 523, 87 L. ed. 959.

XIV. *Question 14* invites consideration of whether bondholders can be held not reasonably justified in rejecting a plan, where the plan had not been validly approved by the Commission and therefore could not have been validly approved by the District Court. This is a question of general importance to the proper administration of railroad reorganizations under Section 77 which has not been, but should be, settled by this Court.

This question is of importance here because, although the Commission subsequently approved the identical plan again in its Sixth Report of May 15, 1945, such plan was not subsequently submitted to creditors for acceptance or rejection (see Question 15 herein). When the plan was submitted in 1944, after the Fifth Report, it was presented to creditors supported by the Third, Fourth and Fifth Reports, which the Circuit Court of Appeals later held [108] to be defective because, on their face, it appeared that the Commission had not exercised its independent judgment as to the value or price of Old Colony.

XV. *Question 15* raises a question of importance to the fair and efficient administration of reorganizations under Section 77 which has not been, but should be settled by this Court.

The provisions of the plan of reorganization (in the Fourth and Fifth Reports) relating to the valuation of and price for the Old Colony assets were remanded to the Commission by the Circuit Court [109] in order that the Commission might exercise its independent judgment thereon and state its reasons. This involved reversing, in that respect, the previous order (No. 734)[110] of the District

[108] 147 F. 2d, 40.
[109] 147 F. 2d, 40.
[110] Stip. R. II, No. 21, p. 11.

Court approving the plan. As is pointed out in our Brief (page 37), the defect in the plan on which the reversal was based was fundamental and far-reaching; it cannot be belittled by terming it "a formal defect" as does the Circuit Court of Appeals below.[111] But the plan which was remanded was the plan which had previously been submitted to the creditors for acceptance or rejection, and, when so submitted, was *rejected* by a majority of the Old Colony bonds voting thereon.

When the same plan was again reported by the Commission in its Sixth Supplemental Report, the District Court attempted to short cut the statutory procedure by (Order No. 821)[112] "enlarging the record" to include that Report and by "reinstating" its previous Order No. 734 approving the plan submitted in the Fourth and Fifth Reports, thus avoiding approving the plan specifically. The Court thereupon also entered Order No. 822[113] confirming the plan.

It should be determined, therefore, by this Court whether the plan as to Old Colony was not required to be resubmitted to the Old Colony bondholders, if not to the New Haven creditors also, for acceptance or rejection *before* confirmation of the plan by Order No. 822. In effect, the lower Courts sanctioned a departure from the statutory procedure, and what should be the usual course of procedure, which should be examined by this Court.

XVI. *Question 16* raises a question which has never been decided by this Court, and should be settled in the interests of efficient administration of railroad reorganizations: Can a plan be "crammed down" the creditors of

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111 F. 2d, , Stip. R. I, No. 15, pp. 12655, 12672.
112 Stip. R. I, No. 12, p. 11922.
113 Stip. R. I, No. 13, p. 11924.

a debtor if a voting majority of *the only class* of creditors affected by the plan have rejected it?

The provision of Section 77(e) referred to as the "cram down" provision is as follows:

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, [and similarly as to stockholders] . . . : *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): . . ."

The plan [114] under consideration is a plan of reorganization for the Old Colony, debtor, as well as a plan of reorganization for the New Haven, debtor, and this is recognized in the plan itself by the several provisions (Section N, subsections (1)(c) and (2)(c), and Section U (3)) for severance of the two plans, permitting the consummation of the plan as to New Haven, while postponing the reorganization of Old Colony to a future plan. The Old Col-

[114] Stip. R. I, No. 1, pp. 10871, 10908, 10922.

ony is and always has been a separate entity, with its own creditors, and can be covered by the same plan which covers the New Haven only because the New Haven owns a majority (but not all) of its capital stock and, under the statute, it could therefore be brought in for reorganization "in connection with, or as a part of a plan for reorganization" of the New Haven. Frank, J., dissenting in the Circuit Court of Appeals below.[115]

We submit that the statutory provision quoted above, which goes beyond the powers granted in any previous bankruptcy law or exercised in any equity receivership proceedings, was intended to promote the public interest in the railroad business by preventing a *minority* from "holding up" a reorganization approved by the public authorities and by a majority of persons interested. This is emphasized by the provisions for voting of creditors and stockholders by classes. The provision was never intended to authorize forcing (as here) a *sale* of its properties upon a railroad against the will of a *majority* of its owners acting on the question. In that case the moral, equitable and practical aspects of policy weigh *against* the exercise of compulsion.

In the report [116] of Joseph B. Eastman as Federal Coordinator of Transportation, which initiated the proposals which resulted in the amendment of Section 77 in 1935, Mr. Eastman said with regard to the "cram down" provision which he then proposed:

> "Arbitrary compulsion of plans over the dissents of the interested classes is not intended, nor is it be-

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115 F. 2d, , Stip. R. I, No. 15, pp. 12692-12697.

116 Reports of Committees, etc., 74th Congress, 1st Session, v. 8, p. 9920; H. Doc. 89; quoted in Record of Hearing before Committee on the Judiciary, House of Representatives, 74th Congress, 1st Session, on H.R. 6249 (proposed revision of Section 77 of Bankruptcy Act), April 15, 1935, p. 22.

> lieved that the courts will override strong dissents by any large number of such classes, or by a single large class, excepting where it is established that they have no interest in the property."

Nor is delay to the consummation of the reorganization of the New Haven an excuse for forcing the plan upon the Old Colony bondholders. The plan itself, in Section U(3), provides that the District Judge may eliminate the Old Colony from reorganization under the present plan, if in his judgment the opposition of the Old Colony bondholders will unreasonably and unnecessarily delay reorganization of the New Haven.

In the present case it must be realized that the abandonment of operation of the Old Colony lines may *not* be the only alternative to acquisition by the New Haven. Acquisition and operation of Old Colony lines by the Boston & Maine or the Boston & Albany, with both of which lines it now connects, might prove equally beneficial to the public as well as more advantageous to the bondholders.[117] If the Old Colony were reorganized apart from the New Haven, either of those railroads might compete with New Haven for the right to acquire the Old Colony lines.

If the "cram down" provision of Section 77(e) were construed to authorize the Court to overrule the rejection of the Old Colony plan by a voting majority of the only class of creditors affected by it, it would, we submit, present a constitutional question: whether the bankruptcy powers of Congress can lawfully go to such lengths, and whether the provision, so construed, would not deprive the Old Colony of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

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[117] 244 I.C.C. 239, 258, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8062.

This Court in the recent *Rio Grande* decision [118] upheld generally the constitutionality of the "cram down" provisions of Section 77(e), but the situation to which the provision was there applied was entirely different from the present case. In the *Rio Grande* case the general mortgage bonds which rejected the plan were only one of many classes of creditors of the principal debtor, constituted only approximately one-fourth of the total debt, and were the most junior class participating in the plan.[119] The language of this Court's decision must be limited in scope to the type of situation before the Court. The Court has therefore not decided the constitutional question as to the application of the provision (*i*) to a class of creditors like the Old Colony bonds, which are senior secured creditors of Old Colony and the only class of its creditors participating in the plan (other than the prior lien claim which is provided for by full cash equivalent); or (*ii*) to forcing a sale of all its assets upon an independent railroad, a procedure the opposite of a sale at a "fair upset price."

It is clear that the bankruptcy powers of Congress are subject to the Fifth Amendment. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 589, 79 L. ed. 1593, 1604 (1935). To cram down on the adverse voting majority of the only class of creditors of the debtor is not merely an extension of the recognized principles of compositions in bankruptcy, it is *different in kind*. The Old Colony bondholders, as secured creditors and as the only class of creditors, with a voting majority against the plan, are in a position not dissimilar to that of the single mortgagee, of which Mr. Justice Brandeis in the above-cited case said (at pp. 585-586):

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[118] Reconstruction Finance Corp. v. Denver & Rio Grande W. R. Co., U.S. , 90 L. ed. 1134, 1154 (decided June 10, 1946).

[119] *In re* Denver & Rio Grande W. R. Co., 62 Fed. Supp. 384, 386, 389 (1944).

> "In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor."

It is true that by almost imperceptible steps [120] this Court has since gone far beyond some of the restrictions on bankruptcy powers over objectors laid down in the *Radford* case, but the foundation of such powers is still the principle of the composition, which apply only to a minority. To impose a settlement on a majority of the debtor's creditors is a violation of due process of law, as well as inconsistent with the provisions of Section 77(e) requiring submission of plans to creditors for acceptance or rejection.

XVII. *Question 17* comprehends the errors of the Courts below with respect to matters raised by Questions 1 to 16, inclusive.

The District Court, in entering its Orders No. 821 with respect to approval of the plan and No. 822 confirming the plan, and the Circuit Court of Appeals for the Second Circuit, in sustaining by a majority of the Court the said orders of the District Court, dealt with questions of interpretation of Section 77 of the Bankruptcy Act which are of general importance to the efficient management of railroad reorganizations under that Federal statute and which have not been but should be considered and settled by this Court; have decided Federal questions probably in conflict with decisions of other Circuit Courts of Appeals or

[120] *As in* Wright v. Union Cent. L. Ins. Co., 311 U.S. 273, 278, 85 L. ed. 184, 186 (1940); *rehearing denied*, 312 U.S. 711, 85 L. ed. 1142.

with decisions of this Court; have so far sanctioned departures from the proper accepted and usual course of judicial and quasi-judicial proceedings as to call for the exercise of this Court's powers of supervision; and have taken or sustained action by the District Court and by the Interstate Commerce Commission in matters vitally affecting the petitioners, in violation of said statute and of the constitutional protection of due process of law.

Conclusion.

Wherefore your petitioners respectfully pray that this petition be sustained and granted, and that a writ of certiorari issue in said cause, as provided by law, to the end that said cause may be reviewed and determined by this Court; and that upon final hearing the judgment of the Circuit Court of Appeals be reversed, with instructions to such appellate Court to cause this cause to be remanded to the District Court for such action as may be required by the mandate of this Court; and the petitioners pray for all other proper relief.

PROTECTIVE COMMITTEE FOR BONDS OF
OLD COLONY RAILROAD COMPANY,
Petitioners,

By JOSEPH B. ELY,
Counsel for said Petitioners.

ELY, BRADFORD, BARTLETT, THOMPSON & BROWN,
WILDER H. HAINES,
RICHARD ELY,
Of Counsel.

No. 1368

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY, *Petitioners*,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR, ET ALS., *Respondents*.

BRIEF OF THE PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF THE PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

This is a Petition for a Writ of Certiorari for review of the judgment of the United States Circuit Court of Appeals of the Second Circuit affirming orders of the United States District Court for the District of Connecticut in the above-entitled matter.

The matters involved and the questions raised are set forth in the accompanying Petition, to which reference is made, in order to avoid duplication of material in this brief.

This brief is for the purpose of setting forth in more detail the significance of certain of the questions raised in the Petition, the reasons why this Court should undertake to consider them after hearing argument on the merits, and your petitioners' position with respect to the issues involved.

Omission of discussion of some of the questions stated in the Petition is not to be taken as a waiver of such questions, or as indicating that they are unimportant. Discussion of such questions is omitted here for the sake of brevity, because it is believed their significance is fully brought out in the Petition and (in some cases) in the dissenting opinion filed in the Circuit Court below and cited in the Petition.

The Course of the Proceedings.

The course of the proceedings for the reorganization of the New Haven and the Old Colony Railroads is outlined in the Petition (p. 4).

Of the eleven and one-half years since the New Haven reorganization began, four and one-half years elapsed before the first plan of reorganization was put forth in March, 1940, by the Commission. This plan, as revised in February, 1941, the Court disapproved in December, 1941, ending the first phase of over six years. When a fresh start was made, the Court and the Commission embarked on a series of "short-cuts" which have only prolonged the proceedings. As Judge Frank, dissenting in the Circuit Court below, says:[1] "The trouble began when the Com-

[1] Stip. R. I, No. 15, p. 12710.

mission's so-called First Supplemental Report, of February 18, 1941, came before the district judge . . . The district judge . . . remanded the plan to the I. C. C. But, before he did so, the judge—saying, in his (unreported) opinion of September 19, 1941,[1a] that the usual procedure (explicitly prescribed by the statute) for Commission valuation, would undesirably delay reorganization—appointed a 'compromise' committee . . ."

Then came the "compromise report" and then the "Joint Report",[2] and the Commission, swayed by pressure for "compromise," adopted the compromise provisions as to Old Colony valuation and price in its Third,[3] Fourth[4] and Fifth[5] Supplemental Reports. This Committee, your petitioners, first organized in June, 1941, was justified in its appeal from approval of that plan, when the Circuit Court of Appeals reversed[6] the approval and returned the plan to the Commission in order that it might exercise its independent judgment on the Old Colony valuation and price, and state its reasons for its conclusions.

The Sixth Supplemental Report now presents the identical Old Colony valuation and price held to have been previously adopted by the Commission because the terms were supposed to be a "compromise." Judge Frank, in his dissent below,[7] has dissected the Commission's explanation of this coincidence. Your petitioners must once more raise on appeal the questions of conformity to proper

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[1a] Correct date December 8, 1941. See Prior S.C. R., vol. A, Ex. 6, p. 8922a.

[2] Stip. R. II, No. 36, p. 133.

[3] 254 I.C.C. 63, 96 (1942), Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9797.

[4] 254 I.C.C. 405, 422 (1943), Prior S.C. R., vol. A, Ex. 9, pp. 10123, 10155.

[5] 257 I.C.C. 9, 16 (1944), Stip. R. I, No. 1, pp. 10831, 10843.

[6] 147 F. 2d, 40; *see also* 150 F. 2d, 169.

[7] Stip. R. I, No. 15, pp. 12708-12734.

legal standards. If the consequent delay to the reorganization since the District Court confirmed the plan on September 6, 1945, must be charged to them, they believe the questions raised by this Petition are of such moment, not only in this case but to the proper and efficient administration of railroad reorganizations generally, that they have no choice but to accept the responsibility, and to proceed, with the indulgence of this Court.

> "There can be considerations more imperative than the dispatch of judicial business, even after delays so long extended in this case. If the legally protected interests of any opposing parties are fully preserved, it is not a good reason to deny others any reasonable chances to protect their own interests that they have been long in asserting them." Learned Hand, J., in *Knight* v. *Wertheim,* 158 F. 2d,—(cited by Frankfurter, J., dissenting in *Insurance Group Committee* v. *Denver & Rio Grande W. R. Co.*, —U.S.—, 15 Law Week, 4189, 4195, February 3, 1947).

See also Frank, J., dissenting opinion below (Stip. R. I, No. 15, p. 12700, note 7, and pp. 12733-4, last paragraph of note 89).

Argument as to Certain Questions in the Petition.

As to Question 6 in the Petition.

(See pages 31 and 46 of the Petition.)

Question 6 raises the question of an inconsistency in the plan of reorganization, if the Old Colony properties are, as the Circuit Court majority hold, on the footing of a division of the New Haven and the Old Colony bonds are treated as a divisional lien of New Haven. On that basis the claim

of the Old Colony bonds against the New Haven estate would consist of the total principal plus accrued and unpaid interest to the valuation date, which has been treated as December 31, 1943, for Old Colony.

The Commission in its (First) Supplemental Report [8] established the amount of the Old Colony bonds claim as of December 31, 1939, as $16,448,000 face amount plus unpaid interest to that date to make a total claim of $19,655,683. We compute the additional interest to December 31, 1943, to make the total claim of the Old Colony bonds approximately $21,612,000.

If it is assumed that the Commission in its Sixth Supplemental Report established the "price" of the Old Colony assets at $18,196,000, consisting of $4,398,305 face amount of new fixed-interest bonds, $3,298,728 face amount of new income bonds, and cancellation of the New Haven prior lien claim of $10,494,000, it nevertheless has not established the "deficiency" of the mortgage security for the bonds, since some of the assets included in establishing the "price" above may not be under the bond mortgage.

Furthermore, even if it is assumed that all the assets valued by the Commission are mortgage security for the Old Colony bonds, thus establishing a deficiency of $3,416,000 in security for the Old Colony bonds (claim of $21,612,000, less assets valued at $18,196,000), the Old Colony bonds (as a divisional lien) would be entitled to participate as an unsecured claim to the extent of that deficiency at least. The plan makes no provision for such participation of the Old Colony bonds as unsecured creditors to that extent, and the total compensation awarded by the Commission to these bonds did not take any such unsecured claim into account, so far as appears in the

[8] 244 I.C.C. 239, 267 (1941), Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8072.

Commission's Reports on the plan. See *Consolidated Rock Products Co.* v. *Du Bois,* 312 U.S. 510, at 527.

The uncompensated deficiency of the Old Colony bond claim is, however, much greater than $3,416,000. Even if the prior lien claim of $10,494,000 is properly a charge against the Old Colony "division" (contrary to the point made in V of the Petition), it is necessarily a lien imposed on the Old Colony *assets,* and thereby reduces the *assets securing* the bonds; but it does not decrease the *claim* represented by the bonds. The Commission has set a "price" of $7,697,033 face amount of new securities for the Old Colony assets after satisfaction of the $10,494,000 prior lien claim. The Old Colony bonds would therefore be unsecured by the difference between the face of the claim, $21,612,000, and the security of $7,697,033. The deficiency of $13,914,967 is not compensated by the present plan, on the "divisional lien" basis, and should be entitled to participate with other New Haven unsecured creditors.

The Old Colony bonds are in a worse position under the plan than other divisional first mortgage bonds of the New Haven, and than were the General Mortgage bonds in the *Milwaukee* case,[9] in that the Old Colony bonds do not receive even a face amount of securities equal to the face amount of their claim, principal and interest, despite the participation of unsecured creditors of the New Haven in the plan. In the Circuit Court below, the New Haven parties argued (see dissenting opinion, p. 12698) that "the provisions in the plan relating to the Old Colony are upon the same footing as those relating to the Housatonics, the New Englands, and the various other divisional liens" of New Haven, and the Circuit Court majority apparently

[9] Institutional Investors v. Chicago, Milwaukee, St. P. & P. R. Co., 318 U.S. 523, 87 L. ed. 959.

adopted this view. But the divisional bond liens designated as the Housatonics and New Englands receive, under the plan, the full face amounts of their claims, principal and interest, in new first and refunding (fixed interest) bonds.[10]

In the *Milwaukee* case (p. 571) this Court directed the District Court to "determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights." The Old Colony bonds assuredly do not receive under the plan any *other* form of compensation for the loss of their senior rights. Neither the Commission nor the District Court discusses compensatory treatment on the basis of the face amount of the Old Colony bond claim, as they failed to do in the *Milwaukee* case also (p. 571).

For these reasons also, if the divisional lien theory is allowed to stand, the plan is unfair, inequitable and discriminatory as to the Old Colony. This Court, we submit, should enforce the application of proper legal standards in that respect.

As to Question 8 in the Petition.

(See pages 32 and 48 of the Petition.)

Question 8 presents the question whether the Commission, in its Sixth Supplemental Report and Order with respect to the plan of reorganization of the Old Colony, exercised its own independent judgment in establishing the value of the Old Colony assets to be sold to the reorganized New Haven, and the price to be paid therefor.

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[10] Appendix A to Fifth Supplemental Report, 257 I.C.C. 9, 29, Stip. R. I, No. 1, pp. 10831, 10867-10868.

That the Sixth Report, in its determination of the price for the Old Colony at exactly the same figures set in the Fifth Report (which the Circuit Court of Appeals held did not represent the Commission's independent judgment), was "capricious and arbitrary," your petitioners can add little to the argument presented in Judge Frank's dissenting opinion in the Circuit Court below.[11]

Your petitioners, however, wish to point out further that, even if the Commission had not to overcome (as Judge Frank demonstrated) the onus of approving again the exact valuation figure which it had previously approved for legally improper reasons, the Commission's Sixth Report is so confused that it is in large measure impossible to find *a statement of its reasons* for approving the plan a second time, or to determine whether it applied proper legal standards or not.

The District Judge had his difficulties in figuring out on what the Commission based its conclusions, and was driven to making a calculation of his own "by assigning . . . a *hypothetical* value not *inconsistent* with the tenor of the Report."[12] (Emphasis supplied.) His calculation was appended[13] under the title "A Permissible Valuation of Old Colony," but unfortunately, as your petitioners demonstrate elsewhere, some of the figures he used *are* inconsistent with values which the Commission indicated it was using. However, the fact that the Court was driven to computing how the Commission's conclusions *might* be supported by "hypothetical" values, in order to justify confirmation of the Commission's plan, indicates the inadequacy of the Commission's statement of its reasons for proposing the plan as to Old Colony.

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[11] Stip. R. I, No. 15, pp. 12708-12734.
[12] Stip. R. I, No. 11, p. 11898.
[13] Stip. R. I, No. 11, p. 11915.

The opinions[14] of the majority of the Circuit Court confirm this:

Judge Swan (at p. 12665): ". . . indeed, we cannot say anything about how it did appraise them, for the Report does not disclose its method." (At p. 12668): "The Report does not expressly mention this item of interest . . . Judge Hincks *assumed* it to be an asset belonging to Old Colony and *construed* the Commission's Report to have treated it 'as an unliquidated claim . . . reflected in its comprehensive valuation . . .'." (At p. 12670): "The Commission merely considered the possibility of deducting the full *ad damnum* (of the Bankers Trust claim), it *did not say that it did* value the breach of lease claim on that basis."

Judge Hand (at p. 12688): "It must be possible somewhere in the record to learn at what amounts the Commission did take the face of the claims, before we can know whether it remained within its jurisdiction; the possibility that it did so, is not enough. Nevertheless, in spite of this *formal* inadequacy, I think there is enough in the record to affirm the order, though I must own that I should have welcomed a clearer declaration in the report." (At p. 12688): ". . . the settlement figure—$3,250,000—which incidentally is *one of the few details, if not the only one* on which the Commission has seen fit to commit itself." (At p. 12689): ". . . but that, *like almost everything else* in the report, was *merely a discussion* of one of the various hypotheses, which *might* justify the final result . . . " (At p. 12690): "I regret that in the form which the case comes before us, we should have to *spell out the actual decision* by such roundabout methods, when it would have indeed been possible to make our path

[14] Stip. R. I, No. 15, pp. 12655, 12686.

> easy by categorical findings. However, since, for the reasons I have tried to give, it appears to me that the Commission kept within the limit of its jurisdiction, I conceive that we have no reason for further prolonging a litigation . . ." (Emphasis supplied.)

Why the Commission avoided making Judge Hand's path easy by categorical findings is explained by Judge Frank in his dissent.

In sum, we submit that the Sixth Report, when read in the light of the prior Reports on the same plan, shows on its face that the approval of the plan as to Old Colony was arrived at capriciously and arbitrarily; and also that the Sixth Report is so deficient in its statement of reasons for the Commission's conclusions, required by Section 77(d), as to afford no adequate basis for determining whether or not proper legal standards were in all respects observed. The remarks of this Court in the early *Milwaukee* decision, 294 U.S. at pp. 510-511, are equally applicable here.

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. Beaumont, S. L. & W. R.

Co. v. United States, 282 U. S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1; Florida v. United States, 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119. We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U.S. 499, 79 L. ed. 1023 (1935).

As to Question 9 in the Petition.

(See pages 32 and 50 of the Petition.)

Question 9 makes the point that the Commission in its valuation of the Old Colony assets to be acquired by New Haven under the plan completely ignored a cash deposit claimed by Old Colony, representing interest paid on $3,600,000 face amount of New Haven first and refunding bonds owned by Old Colony; and also that the District Court has never adjudicated Old Colony's right to this asset, but has kept these interest payments impounded in a special bank account "pending further order of this court." [15]

Until the Old Colony's title to this cash deposit is adjudicated, no plan which omits it as an Old Colony asset can comply with the proper legal standards. This Court has remanded plans of reorganization to the District Court for similar deficiencies.

See—

Consolidated Rock Products Co. v. *Du Bois*, 312 U.S. 510, 520, 85 L. ed. 982, 990;

Group of Institutional Investors v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U.S. 523, 568-569, 87 L. ed. 959, 1009—

cited in the Petition on this point.

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[15] Stip. R. I, No. 11, pp. 11895-11896.

When the present plan came up for confirmation, the District Court became tardily aware of its default in this respect,[16] but seemed of the opinion that the Commission could remedy, and had remedied, the lack of adjudication, despite the fact that the Sixth Report makes no reference whatever to this interest cash fund. The District Court says:[17] ". . . I can only *infer* that the Commission treated this item, like the claim against Bankers Trust Company, as an *unliquidated* claim the proper value of which in its independent judgment was duly reflected in its comprehensive valuation of all Old Colony assets." (Emphasis supplied.)

Your petitioners submit, first, that this cash deposit was not in any true sense an *unliquidated* claim; the question, if any, was actually one of title: Was the Old Colony entitled to the cash interest on deposit pending further order of the Court, or not? and, second, that the determination of title and of the liquidated amount of the claim must be made by the Court and not the Commission. See Judge Hand's discussion of this point with respect to this and other claims of Old Colony, in the Circuit Court of Appeals below:[18] "I cannot divorce the three items here in controversy, in their aspect as assets of Old Colony, from their aspect as claims against New Haven, and in that aspect Hincks, J., had exclusive jurisdiction to determine their validity and amount; although only the Commission might set their value, when so liquidated, in terms of new securities." As to this interest item, its "value" is the same as its "amount," since it consists of a cash bank deposit in the hands of the Court.

Whatever the Commission might or might not have done, within its lawful scope, your petitioners will point

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[16] *Op. cit.*, 11895-11897.
[17] *Op. cit.*, 11897.
[18] Stip. R. I, No. 15, p. 12687.

out what it did do in approving the plan of reorganization: It completely omitted to take into account, as an Old Colony asset, cash interest on deposit to the extent of $792,000 (or, at the least, $640,000) up to June 30, 1943, or $1,080,000 at August 31, 1945.

Appendix A[19] attached to the Fifth Supplemental Report lists these New Haven bonds owned by Old Colony in the table showing distribution of reorganization securities under the plan, stating face amount $3,600,000, interest accrued from June 2, 1936, *to June 30, 1943,* $379,200, or a total claim of $3,979,000. In footnote 1 it is explained that the interest figure represents the balance *after deduction* of interest payments of $792,000 (May 13, 1935, to November 13, 1940) impounded in a special account by order of the District Court, of which amount $640,000 represents interest from June 2, 1936 (the date of rejection of the Old Colony lease), to November 13, 1940. Thus the total interest *accrued* plus interest *deposited* from May 13, 1935, *to June 30, 1943,* is $1,171,200, and from June 2, 1936 (date of rejection of Old Colony lease), to June 30, 1943, is $1,019,200. (We contend that the larger figure is the correct amount of the Old Colony interest claim.) Only $379,200 of either total was taken into account by the Commission, leaving $792,000 (or at least $640,000) unaccounted for.

Judge Hand, in the Circuit Court of Appeals below,[20] being unable to find any reference in the Sixth Report to this interest claim, falls back on the reference to it in Appendix A summarized above, and draws the conclusion that this reference indicates the Commission *must have* included the interest in applying these New Haven bonds to settlement of the prior lien claim. It can be mathematically demonstrated from the Sixth Report that the

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[19] 257 I.C.C. 9, 29, Stip. R. I, No. 1, pp. 10831, 10867-10868.
[20] Stip. R. I, No. 15, pp. 12689-12690.

Commission did not include $792,000 (or $640,000) of the deposited interest in its valuation of this asset.

The Sixth Report [21] states that for the $3,600,000 New Haven bonds Old Colony would be entitled to receive $1,227,411 face amount of new fixed interest bonds, $1,776,601 new income bonds and $975,188 par value of new preferred stock of New Haven, all of which, valued "upon the basis of the expert testimony of record," would be worth $2,010,347. But these face amounts of new securities are exactly those set forth in Appendix A as distributable on the principal of the bonds *plus only $379,200 accrued interest.* Therefore the $792,000 of cash interest is not taken into account, it being in a special account and *deducted* from the *total* accrued interest as explained in footnote 1 to Appendix A. This cash fund claimed by Old Colony has been entirely overlooked in computing the Old Colony assets.

This is further demonstrated when the Sixth Report [22] adds up the Old Colony assets, including these New Haven bonds, to be offset against the prior lien claim of $10,494,844.

The valuation of the Old Colony assets to be acquired by New Haven proceeds in the Sixth Report by two main steps: First, the payment of the New Haven's prior lien claim by Old Colony assets, and, second, the fixing of an over-all price in new securities for the remaining assets. Unlike the rest of the Report, the provisions are clear and specific as to what assets the Commission is applying to payment of the prior lien claim, and at what values; for the Commission lists them and sets down their total value. It says: [23]

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[21] 261 I.C.C. 195, 204-205, Stip. R. I, No. 3, pp. 11682, 11695.
[22] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[23] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.

"Under the plan approved by us the prior-lien claim of the principal debtor's trustees against Old Colony, and the claims of Old Colony against the principal debtor and the Bankers Trust Company are to be released and canceled. Thus, in effect, the prior-lien claim is to be considered part of the purchase price of Old Colony properties and assets, as also are the cash requirements to discharge claims against Old Colony. The total of these items is $10,494,844. Under the values *assigned* by us for (1) the Union Freight Railroad stock, (2) the suit against the Bankers Trust Company, (3) the reorganization securities allocable to Old Colony for its $3,600,000 first and refunding bonds, and (4) the unsecured claim of Old Colony, an *aggregate sum of $8,605,660 is produced.* If this sum is used as an offset against the aggregate of the prior-lien claim and cash requirements, there would remain a balance of $1,889,184 in favor of the principal debtor's estate." (Emphasis supplied.)

The assets and values "assigned" by the Commission (with page references to the Sixth Report) are:

(1)	Union Freight Railroad stock	$ 235,000 (p. 11695)
(2)	Bankers Trust claim	3,250,000 (p. 11695)
(3)	"reorganization securities allocable to Old Colony for its $3,600,000 bonds"	2,010,347 (p. 11696)
(4)	Unsecured claim on lease	3,110,313 (p. 11696)
	Total	$8,605,660

The value for item (3) is that stated above as assigned to the new securities distributable on the $3,600,000 face

amount of bonds plus only $379,200 accrued interest. The $792,000 cash interest on deposit is not taken into account.

(Furthermore, the above computation by the Commission allows the Old Colony, for the $379,000 accrued interest included in item (3), only the discounted market value of new securities distributable under the plan, instead of face amount. All other holders of the New Haven first and refunding bonds have received their interest *in cash*. They have also received cash interest accrued subsequent to June 30, 1943.)

As has been explained under Question 8 above, the District Judge attempted, hypothetically, to figure out how the Commission might have arrived at the price to be paid Old Colony, in his computation entitled "A Permissible Valuation of Old Colony."[24] For this purpose he inserts in his tabulation a new item, admittedly not mentioned in the Commission's Sixth Report, representing $928,000 of cash interest, purporting to represent interest from June 2, 1936, to August 31, 1945.[25] However, in trying to supply the Commission's errors and omissions in respect to the Bankers Trust claim (see under Question 10 below) and the balance of this interest claim, and at the same time to come out with the same total price in new securities as the Commission approved, the District Judge is compelled to squeeze the value of his last item, the Market Terminal properties, into a much smaller figure than the Commission or any party had ever suggested—$1,776,412 instead of the $4,350,128 physical value[26] most often referred to.[27]

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[24] Stip. R. I, No. 11, pp. 11891, 11915.

[25] *Op. cit.*, 11896.

[26] (First) Supplemental Report, 244 I.C.C. 239, 260, Prior S.C. R., vol. A, Ex. 2, pp. 8037, 8064.

[27] Sixth Supplemental Report, 261 I.C.C. 195, 201-202, 207-208, Stip. R. I, No. 3, pp. 11682, 11691, 11698-11699.

As to Question 10 in the Petition.

(See pages 33 and 51 of the Petition.)

Question 10 points out a second instance of improper valuation of the Old Colony assets by the Commission, which can be demonstrated on the face of the record in the Sixth Supplemental Report.

The Bankers Trust Company was trustee of the mortgage securing the New Haven's first and refunding bonds, and as such became the assignee from New Haven of the lease of the Old Colony lines, which lease constituted part of the collateral security for the New Haven bonds. After the Old Colony lease was disaffirmed by the New Haven trustees, the Old Colony trustees commenced action against the Bankers Trust Company for its breach of the lease, as assignee, resulting from failure to pay the rent reserved. The amount sought to be recovered by Old Colony is $13,379,215. This suit has never been tried but is pending. Various parties to the reorganization have suggested compromise values for the Old Colony's claim against Bankers Trust; the compromise figure of $3,250,000 was eventually suggested in the Joint Report and is not contested in the present proceeding by your petitioners. It has been generally accepted by the Commission,[28] and the Circuit Court of Appeals [29] construes it to be acceptable to all concerned, although the Old Colony and the Bankers Trust have not agreed upon the compromise nor the District Court "allowed" it. The plan provides for cancellation of the Old Colony's claim against Bankers Trust, in the interest of the New Haven, since New Haven has a possible obligation to indemnify the Bankers Trust in case the latter were held liable to Old Colony.

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[28] Sixth Supplemental Report, 261 I.C.C. 195, 204-205, Stip. R. I, No. 3, 11682, 11695.

[29] Stip. R. I, No. 15, p. 12688.

The Old Colony concedes that, since the claim against the assignee of the lease, Bankers Trust Company, arises from non-payment of rent resulting in breach of the lease, and the breach of lease claim against the New Haven also covers non-payment of rent, it is not entitled to recover in full on both claims, and that payments received or credits given upon the Bankers Trust claim are *pro tanto* an offset against the New Haven claim.

The District Judge has said:[30]

> "It is, of course, perfectly obvious as a matter of law that if the Old Colony claim against Bankers Trust were liquidated in the amount of $3,250,000—and the earlier passage (P. R. 11695) quoted above indicates that the Commission took this claim as having a liquidated value in that amount—Old Colony's unsecured claim against the principal debtor should be treated as reduced only by that amount ($3,250,000) rather than by the full amount of recovery sought ($13,379,215) as stated in the ad damnum clause of the Old Colony declaration against the Bankers Trust Company."

With this your petitioners entirely agree. The question is: What did the Commission do? By what amount did it reduce the Old Colony claim against New Haven for breach of lease, on account of the assumed compromise settlement of the Old Colony claim against Bankers Trust for $3,250,000?

The Sixth Report says:[31]

> "The amount of the Old Colony's unsecured claim against the principal debtor as determined by the district court is $47,186,963. If there be deducted from

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[30] Stip. R. I, No. 11, p. 11894.

[31] 261 I.C.C. 195, 205-206, Stip. R. I, No. 3, pp. 11682, 11696.

> that amount *the full recovery sought in the suit against the Bankers Trust Company* (*$13,379,215*), the claim would be reduced to $33,807,748, and under the plan, the Old Colony would be entitled to receive approximately $31,103,128, par amount of new common stock on this claim. Based upon the expert testimony that the new common stock would have a value of approximately $10 a share, this claim would have *a value of $3,110,313.*" (Emphasis supplied.)

On this the District Court, in a valiant attempt to sustain the plan by "seeing no evil," and echoed by the Circuit Court of Appeals majority,[32] comments on the above passage from the Sixth Report as follows:[33]

> "But there is nothing in the Report to suggest that the comprehensive valuation of the Old Colony estate by the Commission was predicated upon a process whereby the value of the unsecured claim was reduced *by the entire ad damnum.* Here, as elsewhere throughout the Report, the Commission recited the conflicting contentions of opposing parties with respect to the valuation of particular assets or groups of assets. There is nothing in the language here or elsewhere to show that this particular contention was treated as valid and controlling upon the comprehensive valuation which was made." (Emphasis supplied.)

Although the Commission's statement (quoted above) as to deduction of the full $13,379,215 claimed against the Bankers Trust Company from the Old Colony's lease claim

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[32] Stip. R. I, No. 15, pp. 12669-12671, 12688-12689.
[33] 261 I.C.C. 195, 204, Stip. R. I, No. 3, pp. 11694-11695.

against New Haven is prefaced by an "if," it did definitely use the resulting value of the reduced lease claim in arriving at its over-all valuation of the Old Colony assets.

Reference has been made under Question 9 above to application made in the Sixth Report [34] of specific Old Colony assets, at specific cash values, to the satisfaction of the so-called prior lien claim of the New Haven trustees.

The list of items so applied, set forth under Question 9 above (p. 15), where item (3) was discussed, is repeated here (page references to the Sixth Report):

(1) Union Freight Railroad Stock	$ 235,000 (p. 11695)
(2) Bankers Trust Claim	3,250,000 (p. 11695)
(3) New securities distributable on $3,600,000 New Haven bonds	2,010,347 (p. 11696)
(4) Unsecured claim on lease	3,110,313 (p. 11696)
Total	$8,605,660

Note that item (2), the Bankers Trust claim, is listed as an asset valued, on a compromise basis, at $3,250,000. In order to arrive at the Commission's total of $8,605,660, it is necessary to take item (4), the unsecured lease claim, at $3,110,313; but that is exactly the figure which, "based upon the expert testimony," the Commission (in the passage quoted above on page 18) set as the cash value of the new common stock distributable on the lease claim *after it had been reduced by $13,379,215, the full ad damnum of the Bankers Trust claim*—not by $3,250,000, the compromise settlement value at which it is included as item (2). Thus the Commission deprived the Old Colony of the value of $10,129,215 of its lease claim, estimated to be represented (in the Commission's 92% ratio) by some $9,612,625 of

[34] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.

new common stock with a value similarly "based upon the expert testimony" of $961,262.

(This obvious error in valuation cannot be reconciled by asserting that item (3) is not correct, as argued under Question 9 above, since item (3) is understated also, as has been demonstrated. Two understatements cannot offset one another.)

In conclusion, this Court should consider whether the Commission in its valuation of Old Colony assets to be acquired by New Haven under the plan has not applied grossly improper legal standards in offsetting the asset of the Bankers Trust claim against the New Haven lease claim at the face amount of the Bankers Trust claim, instead of at the compromise settlement value at which this asset is credited to Old Colony; and consequently understated by at least $961,262 cash value (in addition to the $792,000 interest credit omitted as shown under Question 9 above) the equivalent price for the Old Colony assets, thereby rendering the plan unfair and inequitable with respect to Old Colony.

Even if these assignments of definite cash values to Old Colony non-operating assets (excepting interest on the $3,600,000 of New Haven bonds, which the Commission ignored completely) were used by the Commission only as a yardstick to measure the adequacy of what may be termed the Commission's ultimate empiric or overall value for all the assets, *still*, if the yardstick was a short yardstick, as we have shown it was, the application of improper standards to the problem of valuation would be a necessary consequence. Would the Commission, or could it properly, have approved that compromise purchase price, if measured by a three-foot yardstick?

AS TO QUESTION 11 IN THE PETITION.

(See pages 33 and 51 of the Petition.)

Question 11 raises another question as to the proper performance of its functions by the Commission in its Sixth Supplemental Report.

As pointed out under Question 10 above, the provisions of the present plan with respect to Old Colony involve two principal steps: (1) Provision for payment, in cash or equivalent, of the New Haven trustees' prior lien claim against Old Colony resulting from operating losses and other expenses; and (2) compensation to the Old Colony bondholders in new securities for the remaining assets of Old Colony. Since the prior lien claim is a prior claim for dollars, it is *essential* that the Old Colony assets applied to payment of such claim be *valued in dollars.*

Such dollar values for certain of the Old Colony assets applied to this purpose (see Sixth Supplemental Report)[35] have not been properly established and used by the Commission. These assets are: (*a*) The $3,600,000 face amount of New Haven first and refunding bonds owned by Old Colony; (*b*) the Old Colony's claim for rejection of its lease to New Haven, and (*c*) a portion of the price to be paid for the remaining Old Colony assets.

(*a*) As to the $3,600,000 New Haven bonds (including $379,200 accrued interest as discussed under Question 9), the Sixth Report[36] states the new securities of the reorganized New Haven issuable under the plan for these old bonds including such interest. The Report then says: "Upon the basis of the expert testimony of record (taking fixed-interest bonds at 90, income bonds at 40, and preferred stock at 20), a valuation of approximately $2,010,347 *would* result." (Emphasis supplied.) It has been

[35] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[36] *Op. cit.*, 205, Stip. R. I, No. 3, pp. 11695-11696.

demonstrated under Question 9 above that this figure was actually applied by the Commission [37] in its calculation of payment of the prior lien claim.

(*b*) As to the Old Colony's breach of lease claim, the Sixth Report, after crediting (in an improper amount, as shown under Question 10 above) the Bankers Trust claim, estimates that $31,103,128 par value of new common stock would be distributable under the plan on the balance of this unsecured claim of Old Colony. The Report then says: [38] "Based upon the expert testimony that the new common stock would have a value of approximately $10 a share, this claim *would* have a value of $3,110,313." (Emphasis supplied.) It has been shown under Question 10 above that this figure was actually applied by the Commission [39] in its calculation of payment of the prior lien claim.

(*c*) The Sixth Report, after adding up [40] the two Old Colony assets mentioned above and also the Union Freight Railroad stock and the Bankers Trust claim, "under the values assigned by" it, states that such assets fall short, by $1,889,184, of satisfying the prior lien claim. The Commission says: [41] "For the purpose of discharging the balance of the prior-lien claim of $1,889,184 against Old Colony, however, it would take $2,099,093 of the $2,275,902 first and refunding bonds to which Old Colony would be entitled" for its remaining assets under the plan. Here again the Commission uses the same "expert" valuation of 90 for the $2,099,093 of new bonds. A similar valuation is used for the same purpose on an alternative hypothesis.

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[37] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[38] *Op. cit.*, 205-206, Stip. R. I, No. 3, p. 11696.
[39] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[40] *Op. cit.*, 207, Stip. R. I, No. 3, p. 11698.
[41] *Op. cit.*, 208, Stip. R. I, No. 3, pp. 11699, 11700.

Unless the sentences quoted above from the Sixth Report constitute findings by the Commission of the value of the new securities applied in lieu of cash to payment of the prior lien claim, *the Commission has made no independent finding,* in any report on this plan, *with respect to the probable market or cash value of the securities of the reorganized New Haven.* It should be noted how carefully, in the quoted sentences, the Commission has *avoided* expressing the dollar values *as its own.* Each is based "upon the expert testimony" and expressed as the value which "would" result, if the "expert" testimony were followed. This appears to be a departure from the practice of the Commission in at least one other case, *Ecker* v. *Western Pacific R. Corp.,* 318 U.S. 448, 461, and note 6, 88 L. ed. 892, 925. There the Commission assigned a value at least to the new no par common stock, if not to all the new securities, in order to establish that senior lienholders were given full compensation.

Why the Commission avoided adopting the "expert" valuations as its own is evident when the character of the "expert" testimony is examined.[42] This is fully discussed in the dissenting opinion [43] in the Circuit Court of Appeals below, where much of the "expert" testimony is quoted, and where it is pointed out that the District Court, in discussing the Third and Fourth Reports, had warned the

[42] The *only* testimony on the probable market or cash values of the new securities to be issued by the reorganized New Haven under the present plan of reorganization is that of Mr. Pierpont V. Davis at the Commission's hearing on February 17, 1942. Mr. Davis' complete testimony on this subject is reproduced in Stip. R. II, No. 29, p. 107. Earlier testimony as to estimated values of the new securities to be issued under the original plan, later disapproved by the Court, is found in the record of hearings held on June 14, 1939, and is reproduced in Stip. R. II, No. 29, p. 93.

[43] Stip. R. I, No. 15, pp. 12720-12725.

Commission that a finding by the Commission of the estimated market values of the new securities was essential (though for a different purpose).

Further, one would not understand from the Sixth Report that the values "based on the expert testimony" are based, as in fact they are, on testimony given in February, 1942, as of that date, while the values needed for calculating payment of the prior lien claim must be *as of December 31, 1943,* the valuation date for the Old Colony plan. Also, since the Sixth Report was not written until after February 13, 1945, when the Old Colony provisions of the plan were referred back to the Commission by the District Court, the Commission was in a much better position to estimate market values as of December 31, 1943, of the new securities than was the single "expert" witness in February, 1942.

The results of the application of the "market values" of new securities based on the "expert testimony" in the three instances (*a*), (*b*) and (*c*) explained above (pp. 22, 23) are of material importance in the aggregate to Old Colony, since, the lower the values used, the more assets are required to satisfy the prior lien claim and the less assets remain for the Old Colony bonds.

The new securities distributable under the plan which are appropriated, in these three instances, in the Sixth Report to payment of the prior lien claim are in face amounts, and are "assigned" by the Commission cash values, as follows:

	Sixth Report	
	Face Amount	Cash Value
(*a*) $3,600,000 first and refunding bonds		
New fixed interest bonds	$1,227,411	$1,104,670
New income bonds	1,776,601	710,640
New preferred stock	975,188	195,038
(*b*) Unsecured claim for breach of lease less $13,379,215 credit for Bankers Trust claim		
New common stock	31,103,128	3,110,313
(*c*) New fixed interest bonds to satisfy balance of prior lien claim	2,099,093	1,889,184
Total	$37,181,421	$7,009,845

If taken on the basis of the "expert testimony," the fixed interest bonds at 90, income bonds at 40, preferred stock at 20 and common at 10, the $37,181,421 "would result" in an aggregate cash value of only $7,009,845 to be credited to the New Haven's prior lien claim.

When the plan was last referred back to the Commission in 1945, your petitioners sought an opportunity at hearings to present evidence that the probable market values of the new securities were substantially higher than the values guessed at by the "expert" witness in February, 1942; but this opportunity was denied by the Commission,[44] and later by the District Court.[45]

The petitioner's offer of proof on July 2, 1945, was, however, included in the record by the District Court.[46] It states that Victor B. Boatner, former Director of Rail Co-ordination in the Office of the Co-ordinator of Transportation and a railroad executive since 1921, would testify, on

[44] 261 I.C.C. 195, 202, Stip. R. I, No. 3, p. 11692.
[45] Stip. R. I, No. 11, p. 11891, 11903.
[46] Stip. R. II, No. 25, pp. 49, 50-52, 57-58.

the basis of an extensive study of the railroad business and railroad securities, that, in his opinion, the new common stock of the reorganized New Haven would sell, when issued, at in excess of $30 per share. It also states that Patrick B. McGinnis, an investment banker who has specialized in railroad reorganization securities for the past thirteen years, would testify that, in his opinion, supported by extensive charts included in the offer of proof, the reorganized New Haven securities, when issued, and if issued about July 1, 1946, would have market values approximately as follows: fixed interest bonds, 105; income bonds, 95; preferred stock, 80; and common stock, 30 to 42. The additional testimony offered by these witnesses is set forth in the offer of proof.

In order to bring out the importance of the lapse of time from the "expert testimony" in February, 1942, to December 31, 1943, this Court is asked to take judicial notice that the Dow-Jones averages for Railroad Stocks (based on common or similar stocks), for High-Grade Railroad Bonds and for Second-Grade Railroad Bonds were as set forth in the following table, on February 16, 1942 (the day before Mr. P. V. Davis's testimony before the Commission), and on December 31, 1943 (the Old Colony valuation date), respectively, viz.:

	Averages		
Dow-Jones	2/16/42	12/31/43	Per cent increase
Railroad Bonds—			
High-Grade	92.43	102.07	10.4%
Railroad Bonds—			
Second-Grade	52.81	67.72	28.2%
Railroad Stocks	27.60	33.56	21.5%

(The December 31, 1943, date here is, of course, eighteen months earlier than the date of the petitioners' offer of proof referred to above.)

It is fair to assume that railroad preferred stocks appreciated, in the above period, less than the common stocks but more than the high-grade bonds, so that the percentage increase in a railroad preferred stock average may fairly be estimated at 15%.

These percentage increases to the Old Colony valuation date, if applied to the estimates or guesses of the "expert witness" before the Commission as to the market values in February, 1942, of the reorganized New Haven securities, would change such probable market values as follows:

New Haven new securities	Estimate 2/17/42	Value adjusted to 12/31/43 level
First and refunding (fixed interest) bonds	90	99.36 (10.4%)
General mortgage (income) bonds	40	51.28 (28.2%)
Preferred stock	20	23.00 (15%)
Common stock	10	12.15 (21.5%)

If the cash values (as of February 17, 1942) "assigned" by the Commission in the Sixth Report, as summarized in the table on page 26 above, are adjusted on the basis of the Dow-Jones averages as of December 31, 1943, as set forth above, it will appear that the three asset items under discussion were materially undervalued when applied to satisfaction of the prior lien claim, viz.:

	Cash Value (p. 26) "assigned" in Sixth Report	Adjusted Cash Value 12/31/43
(*a*) $3,600,000 first and refunding bonds		
New fixed interest bonds	$1,104,670	$1,219,665
New income bonds	710,640	911,041
New preferred stock	195,038	224,293
(*b*) Unsecured lease claim less $13,379,215 credit for Bankers Trust claim		
New common stock	3,110,313	3,779,030*
(*c*) $2,099,093 additional new fixed interest bonds	1,889,184	2,085,659
Total	$7,009,845	$8,219,688

*(If the correct credit of $3,250,000 for the Bankers Trust claim were used—see Question 10, page 17 above—the adjusted value of this item would be $5,338,341.)

The difference, $1,209,843, between the 12/31/43 adjusted value of $8,219,688 and the 2/17/42 "expert" value of $7,009,845 used by the Commission for the same three asset items indicates that these assets were undervalued to that extent by the Commission, and that, on the basis of comparison used above, the Old Colony bondholders would be entitled to the excess $1,209,843 cash value, for which they are not compensated in the plan.

To state it another way, to make a total cash value of $7,009,845 for these assets to be applied to satisfaction of the prior lien claim as in the Sixth Report, only $880,169 face amount of item (*c*) new fixed interest bonds, with a cash value of $875,816, would be required. The remaining $1,218,924 face amount (cash value $1,209,843) of these bonds would be saved, and be available for distribution to the Old Colony bondholders *in addition* to the $7,697,033 face amount of new bonds awarded them in the plan.

While the application of the increase in the Dow-Jones averages for railroad securities from the date of valuations mentioned in the Sixth Report to the date, December 31, 1943, as of which valuations are required by the plan cannot be considered as demonstrating conclusively the corresponding increases in the probable market values of the reorganized New Haven securities, the Dow-Jones increases do demonstrate that *some* increase from the estimates referred to by the Commission is justified and would have been ascertained if the Commission had done its duty in that respect; and that the increase would result in substantial benefit to the Old Colony bonds. The saving to the Old Colony of $1,209,843 cash value of assets, indicated above, if translated into $1,218,924 face amount of fixed interest bonds, would increase the new securities distributable under the plan to the Old Colony bonds from $7,697,033 to $8,915,967 face amount, or 15.8%.

This saving of $1,209,843 added to the $792,000 of interest (under 9 above) paid on the $3,600,000 bonds, but overlooked by the Commission, and to the $961,262 error in the "assigned" value of the lease claim (under 10 above), produces a total error of $2,963,105, or about $3,000,000 in cash value. This discrepancy (which is minimum), if paid in new fixed interest bonds, would give the Old Colony bondholders, in face amount, $10,679,224 of new bonds, rather than the present amount, $7,697,033. This amounts to more than a 25% increase in the net price to the Old Colony bondholders.

In conclusion, this Court in the interest of the application of proper legal standards in Section 77 proceedings should determine whether the Commission failed to make its own independent findings of the essential probable market values as of December 31, 1943, of the new securities applied to the satisfaction of the prior lien claim against Old Colony; and whether, if such findings were made by

implication, they were based on evidence so meager and so out of date as to be unsupported by sufficient evidence.

As to Question 12 in the Petition.

(See pages 33 and 53 of the Petition.)

Question 12 involves the proper construction of the provision of Section 77(d), quoted in the Petition.

The actions of the Commission which raise the question were as follows: After the Court disapproved its original plan, the Commission in February, 1942, held hearings on the matter of a plan of reorganization for the New Haven and particularly the Old Colony. Previous to that time the District Court had "informally" appointed a compromise committee (on which your petitioners were not represented) "to explore the possibilities of progress by compromise" to safeguard the New Haven from excessive burdens which might possibly arise from its assumption of the charter obligations of the Old Colony.[47] That committee had filed with the Court a report [48] containing recommendations for cutting down the Boston Terminal obligations of both New Haven and Old Colony, and for limiting the obligations of the New Haven with respect to the Old Colony's passenger service, and especially its Boston Group suburban lines. (These provisions were, in substance, embodied by the Commission in the present plan of reorganization.) The District Court had then disapproved the original plan of reorganization approved by the Commission's Original Report, as modified by its First and Second Supplemental Reports. The Committee did not then attempt to recommend a fair purchase price for the Old Colony, since it had no assurance that its previous

[47] Prior S.C. R., vol. A, Ex. 6, pp. 8956-8958.
[48] *Op. cit.*, Appendix at p. 9013.

recommendation would be accepted as a basis for the question of price.[49]

At the outset of the reopened hearings of the Commission, in February, 1942, counsel for the New Haven and certain creditors raised the question whether, if the Committee should pursue its negotiations toward a compromise fair purchase price for the Old Colony, they could be assured their previous recommendations limiting the obligations to be assumed by New Haven would be approved by the Commission.[50] At the conclusion of the hearings on February 20, 1942, the Commission's representative ruled that the record would be kept open until April 4, 1942, for the purpose of receiving any agreement arrived at by the compromise committee as to the Old Colony price, "it being understood that any proposal or agreement as to a fair purchase price would not be considered binding unless the terms and conditions proposed in the compromise committee report were approved." The record was also kept open until April 20, 1942, for the purpose of receiving briefs from any parties interested.[51]

On or before April 4, 1942, the compromise committee filed its Joint Report [52] recommending the compromise purchase price for the Old Colony properties which the Commission adopted and approved in its Third Supplemental Report,[53] and which forms the basis, as adjusted for subsequent Old Colony earnings, for the price provided in the present plan. No price for the Old Colony such as the Joint Report proposed was ever proposed, for the record, either prior to or during the February, 1942, hearings.

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[49] *Op. cit.*, 8962, and Third Supplemental Report, 254 I.C.C. 63, 64, Prior S.C. R., vol. A, Ex. 8, pp. 9753, 9760-9761.

[50] Third Supplemental Report, *op. cit.*, 64, Prior S.C. R., vol. A, Ex. 8, p. 9761.

[51] *Op. cit.*, 64, Prior S.C. R., vol. A, Ex. 8, p. 9761.

[52] Stip. R. II, No. 36, pp. 133, 152.

[53] 254 I.C.C. 63, 99, Prior S.C. R., vol. A, Ex. 8, p. 9753.

No hearings for the reception of evidence or oral argument, or for cross-examination of witnesses, have been held by the Commission since February 20, 1942.

Your petitioners submit, on the foregoing record, that (*i*) the Joint Report obviously constituted, in substance, a "plan of reorganization" proposed for the Old Colony, as well as an important section of the plan for the New Haven; and (*ii*) the Commission was obligated by Section 77(d) to hold or continue its hearings *after* the filing of the Joint Repor with it.

On the latter point, the two sentences of Section 77(d) quoted in the Petition under Question 12 require interpretation, since the first sentence permits filing of a plan *during* a hearing (but only with the Commission's consent), while the second sentence requires a hearing *after* a plan has been filed. To give effect to both sentences would seem to require that, in case a plan is filed *during* a hearing, the hearing be continued *after* the plan is so filed. In the present case, by holding open the record after the hearings ended, the Commission may technically have arranged for the Joint Report plan to be filed "during" the hearing; but granting two weeks thereafter to file briefs was not the equivalent of giving a "hearing" *after* that plan was filed.

The proper construction of the provisions of Section 77(d) for hearings, in a situation such as is presented here, and the prompt checking of unauthorized adoption by the lower courts of short cuts not in accord with the usual and prescribed procedure, are matters of importance for the efficient and fair administration of reorganizations under Section 77, and should be settled by this Court. This is no mere technical question, but goes to the root of the statute. The drastic powers of the Bankruptcy Court under Section 77 must be founded on a policy of assuring

a fair and reasonable opportunity to all parties in interest to be heard, and we believe the section provides such opportunities. Every encroachment on this policy of fair hearing must be vigilantly resisted by the courts.

The technical approach of the Circuit Court of Appeals [54] below to this issue, we submit, not only gives a construction to Section 77(d) which is unjustified technically, but is wrong as a matter of fundamental policy. It was not a question of a new notice, as the Circuit Court of Appeals appears to think, since all that the statute required was that the Commission adjourn the February, 1942, hearings to be resumed after the Joint Report was filed. Nor, if the statute required a hearing after such filing, was it necessary for your petitioners or any other party to "request" such hearing, as the Circuit Court of Appeals asserts. Your petitioners have consistently objected, at every subsequent opportunity, to the Commission's failure to hold such a hearing, and this objection is properly raised in these proceedings as the Circuit Court of Appeals agrees.

An opportunity to file briefs after the Joint Report was submitted was not the equivalent of a "hearing." *Morgan* v. *United States,* 298 U.S. 468, 480. *Morgan* v. *United States,* 304 U.S. 1, 18. Here, there was no opportunity to submit evidence, to cross-examine the proponents of the Joint Report plan or to argue orally on the merits of the proposed price for the Old Colony first put forward in the Joint Report. That your petitioners desired and assert they had a right to.

In view of the basic importance which the Joint Report price proposal acquired in these proceedings when it was adopted by the Commission and stubbornly adhered to in its Third, Fourth, Fifth and Sixth Supplemental Reports,

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[54] Stip. R. I, No. 15, p. 12663.

and in view of the fact that this price (as adjusted) was subsequently crammed down the Old Colony bondholders by the District Court, despite their rejection, how can it be said that your petitioners were not deprived of a fair hearing on the matter most vital to them in the entire plan?

As to Question 13 in the Petition.

(See pages 34 and 55 of the Petition.)

Question 13 involves the construction of the provisions in Section 77(d) quoted in the Petition.

The question here is whether these provisions apply, when a District Court order approving a plan has been affirmed in part but reversed in part with instructions that the whole plan or a specified part be remanded to the Commission for further action. In the Old Colony case, upon partial reversal the District Court remanded the entire plan to the Commission but limited the purposes for which it was returned to the independent valuation of the Old Colony assets and the price therefor, the most important elements of the plan as to Old Colony. The Commission denied the petition of your petitioners here for public hearings, and held no hearings prior to making its Sixth Supplemental Report and Order.

It is pointed out under Question 13 in the Petition that the question here was not raised in or decided by *In re Chicago, Milwaukee, St. P. & P. R. Co.*, 145 F. 2d, 299; *cert. den.* 324 U.S. 857, 89 L. ed. 1415, since there the Commission *did hold hearings* and receive evidence with respect to the remanded particulars of the plan (*see* 58 F. Supp. 384, 387), as your petitioners here contend the Commission should have done in the Old Colony case.

Ford Motor Co. v. *Nat. Labor Relations Board*, 305 U.S. 364, 83 L. ed. 221, cited by the Circuit Court of Appeals

below,[55] involved the National Labor Relations Act, which provides (Section 10(e)) that, in proceedings in the Circuit Court of Appeals, that Court may order additional evidence to be taken by the Board. The discretion there belongs to the Circuit Court of Appeals. This is entirely different from the statutory requirements of Section 77(d) and (e) of the Bankruptcy Act, quoted above.

Nor is the statement of the Circuit Court of Appeals conclusive, when in its previous decision[56] remanding the Old Colony valuation in the New Haven plan it said: "The Commission may wish to take additional evidence and to modify the plan in the light of new facts. We do not wish to preclude such a course if the Commission thinks it desirable." If the Commission was *obligated* by Section 77(d) and (e) to hold hearings on the aspects of the plan remanded to it, the intimation of the Circuit Court of Appeals that the holding of hearings was discretionary would not control the Commission. This is the question which this Court should consider and decide.

The reason why the Circuit Court of Appeals remanded the Old Colony valuation aspects of the plan to the Commission was that (in its Third, Fourth and Fifth Supplemental Reports and Orders) the Commission[57] "was influenced by the pressure of the compromise agreement and by the fear that a large block of security holders of New Haven would not consent to a plan materially different." In view of this, and of the fact that no opportunity (see under Question 12, above) to present evidence or to argue or cross-examine before the Commission has ever been afforded by the Commission since the Joint Report compromise plan (which the Commission has adopted in substance) was filed, it was particularly imperative that

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[55] Stip. R. I, No. 15, p. 12662.
[56] 147 F. 2d, 40, 54.
[57] 147 F. 2d, 40, 50.

the Commission grant such an opportunity upon remand of the plan. What better way to free itself from the stigma of undue pressure from the so-called "compromise"!

The question here is more than one of procedure, or of formal defect; it is rather whether your petitioners have not been deprived of substantial rights in being denied a hearing upon the remanded aspects of the plan. In fact, a more fundamental defect in a plan is hardly conceivable than to find (as the Circuit Court of Appeals did) that the Commission had not exercised its independent judgment in, nor stated valid reasons for, its valuation of the Old Colony assets. The Circuit Court of Appeals recognized the sweeping character of this defect when it held:[58]

> "The prior appeal (147 Fed. 2d 40) decided nothing respecting the provisions affecting Old Colony except that the Commission had not made independent findings of value and of price and the statute required that it should. Hence the Commission's new report will be subject to attack upon any legal ground when it comes before the district court."

In the interest of efficient administration of many cases under Section 77, it is of importance that the effect of a partial reversal of an order approving a plan, and of partial remand of a plan to the Commission, and the application to such situation of sub-sections (d) and (e), be settled by this Court, and that an improper departure by the Commission from its own practices as to hearings (see the *Milwaukee* decision, 58 F. Supp. 384, 387, cited above) should not be sanctioned by the lower courts as in this case.

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[58] 150 F. 2d, 169, 170, Stip. R. I, No. 5, pp. 11825, 11827.

As to Question 14 in the Petition.

(See pages 34 and 57 of the Petition.)

Question 14 invites consideration of whether bondholders can be held not reasonably justified in rejecting a plan, where the plan had not been validly approved by the Commission and, therefore, could not have been validly approved by the District Court. This is a question of general importance to the proper administration of railroad reorganizations under Section 77, which has not been, but should be, settled by this Court.

This question is of importance here because, although the Commission subsequently approved the identical plan again in its Sixth Report of May 15, 1945, such plan was not subsequently submitted to creditors for acceptance or rejection (see under Question 15 herein).

On February 8, 1944, the Commission issued its Fifth Supplemental Report and Order purporting to approve a plan of reorganization with certain modifications specified in the Order (the modified plan being identical with the plan now before this Court); and the District Court promptly entered its Order No. 734 [59] purporting to approve the plan. Your petitioners and others appealed from this order, but meanwhile the order was certified to the Commission and it proceeded to submit the plan to various classes of creditors, including the Old Colony bondholders, for approval. The ballots were accompanied, as required by Section 77(e), by copies of the Third, Fourth and Fifth Supplemental Reports of the Commission and of the opinions and orders of the Court, among other papers. On December 29, 1944, the Commission certified [60] the results, showing that less than two-thirds of the Housatonic divisional lien bonds of New Haven voting had

[59] Stip. R. II, No. 21, p. 11, D. R. 11050.
[60] C.C.A. R., Ex. , D. R. 11516.

accepted the plan, that 50.6% of the Old Colony bonds voting had *rejected* the plan, and that the requisite percentage of the other classes had accepted it.

Four days later the Circuit Court of Appeals reversed [61] the District Court order approving the plan, so that the Commission might make its own independent findings of value of and price for the Old Colony assets. The principal recommendations of the fairness of the plan on which the creditors were to rely in voting were the recommendations of the Commission in its Third, Fourth and Fifth Reports; if these Reports showed on their face that the Commission had been influenced by fear and pressure for compromise, with respect to the treatment of Old Colony, surely the Old Colony bondholders were justified in rejecting a price brought forward by the Commission in such circumstances.

The Circuit Court of Appeals said: [62]

> "The Commission's third supplemental report, 254 I. C. C. 63, with respect to the Old Colony purchase price is substantially a copy of the Joint Report changed only to meet the requirements of a report by the Commission. The Commission said, 254 I. C. C. at page 96: 'As seen herein, the principal debtor and its major secured creditors, the Old Colony and the mutual savings bank group, the latter holding more than one-half of the bonds of the Old Colony, and a representative of the public, an assistant attorney general of the Commonwealth of Massachusetts (it was understood that any agreement of the assistant attorney general would not be binding on the Commonwealth), have agreed upon a compromise purchase price. The basis of the compromise has been fully explained. The desirability, in some situations,

[61] 147 F. 2d, 40.
[62] *Op. cit.*, 49-50.

of a compromise has been stated by the Supreme Court in *Case* [*et al.*] v. *Los Angeles Lumber Co.* [*Ltd.*], 308 U. S. 106 [60 S. Ct. 1, 84 L. Ed. 110]. While the agreed purchase price is smaller in amount than that which we formerly determined, upon further consideration, we find that the purchase price proposed in the joint report is fair and equitable, and, in our opinion, conforms to the principles which the court in its opinion indicated governed, and we will modify the plan accordingly.'

"Again, 254 I. C. C. at page 99, the Commission said that 'the court . . . indicated that in its opinion the best prospect of prompt progress appeared to be by reasonable compromise.' It said also that while the principal New Haven and Old Colony parties 'have evolved an agreed basis for inclusion of the Old Colony in the reorganization,' certain of Old Colony's security holders and representatives of the Commonwealth of Massachusetts 'strongly oppose such agreement.' It then added 'In our opinion, and we have so found, the agreement in respect of the Old Colony, with minor modifications made therein by us, offers a fair and equitable solution of these problems.'

"We find it difficult to read the third supplemental report and draw any inference other than that the agreement of the parties was the dominant factor in the Commission's formal finding that the purchase price is fair and equitable. This formal finding might perhaps suffice if the Commission had stated the reasons which lead it to reduce by some $10,000,000 face value of the new securities its prior valuation, but we find no reference to facts causing such change unless it be the compromise approved by the parties. Moreover, in its fourth supplemental report (254 I. C. C. 405, 422) the Commission, after discussing a proposal

by the Commonwealth of Massachusetts with respect to Old Colony, makes the following significant statement: 'It is likewise clear that to modify materially the provisions of the joint report in respect of the Old Colony would be to nullify the compromise agreement reached after extended negotiations with little or no expectation that the suggested modification would prove acceptable to the interested parties. The result again would be a further delay in the consummation of the reorganization of the principal debtor and the Old Colony.'

"*We cannot read this otherwise than as meaning that the Commission accepted the compromise of the joint report for fear that any material modification of it, which the Commission might have independently approved as fair and equitable, would be unacceptable to the parties and would result in delay in consummation of a reorganization.* That is to say, the Commission was influenced by the pressure of the compromise agreement and by the fear that a large block of sec r-ity holders of New Haven would not consent to a plan materially different. We think the appellant has substantiated its contention that the Commission exercised no independent judgment in fixing the purchase price for Old Colony assets but followed the easy route of accepting the compromise." (Emphasis supplied.)

As to Question 15 in the Petition.

(See pages 35 and 57 of the Petition.)

Question 15 raises a question of importance to the fair and efficient administration of reorganizations under Section 77, which has not been, but should be, settled by this Court.

The provisions of the plan of reorganization (in the Fourth and Fifth Reports) relating to the valuation of and price for the Old Colony assets were remanded to the Commission by the Circuit Court of Appeals [63] in order that the Commission might exercise its independent judgment thereon and state its reasons. This involved reversing, in that respect, the previous order (No. 734) of the District Court approving the plan. As has been pointed out above at the end of the discussion of Question 13, the defect in the plan on which the reversal was based was fundamental and far-reaching; it cannot be belittled by terming it "a formal defect" as does the Circuit Court of Appeals below.[64] But the plan which was remanded was the plan which had previously been submitted to the creditors for acceptance or rejection, and, when so submitted, was rejected by a majority of the Old Colony bondholders voting thereon.

When the same plan was again reported by the Commission in its Sixth Supplemental Report, the District Court attempted to short-cut the statutory procedure by (Order No. 821)[65] "enlarging the record" to include that Report and by "reinstating" its previous order No. 734, approving the plan submitted in the Fourth and Fifth Reports, thus avoiding approving the plan specifically. The Court thereupon also entered Order No. 822 confirming the plan.[66]

It has been pointed out, at the end of the discussion of Question 12, that the elements of the plan remanded to the Commission by the Circuit Court of Appeals were the core of the plan as to Old Colony, and it would follow that the Commission in its Sixth Report and Order was certi-

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[63] 147 F. 2d, 40.
[64] Stip. R. I, No. 15, p. 12672.
[65] Stip. R. I, No. 12, p. 11922.
[66] Stip. R. I, No. 13, p. 11924.

fying to the Court a "plan," at least as to Old Colony, within the meaning of Section 77(d) and (e).

It should be determined, therefore, by this Court whether the plan as to Old Colony was not required to be resubmitted to the Old Colony bondholders, if not to the New Haven creditors also, for acceptance or rejection. In effect, the lower Courts sanctioned a departure from the statutory procedure, and what should be the usual course of procedure, which should be examined by this Court.

The Circuit Court of Appeals below [67] reasons that such submission would be "futile," the plan previously submitted to vote being unchanged, since, if the Old Colony bondholders again rejected it, "discretionary confirmation [by the District Court] would follow." The reasoning that submission of a plan to vote is unnecessary since the Court can "cram down" the plan on dissenters in any event goes too far; it would render submission of *any* plan "futile" and nullify the statutory provision for submission of plans. Nor should the Circuit Court of Appeals take the District Court's future discretionary decision for granted. The District Court would be required to grant a hearing to the objectors, and, for example, if the majority vote of the Old Colony bondholders for rejection of the plan should heavily increase on the second submission, the Court might elect to exclude the Old Colony entirely from the plan, as provided therein.[68]

If this Court should reverse the Courts below on any ground raised by this Petition, the District Court may consider the procedural short-cut described above to be again appropriate, unless this question is decided here.

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[67] Stip. R. I, No. 15, pp. 12672-12673.
[68] Stip. R. I, No. 1, pp. 10831, 10922.

Conclusion.

For the reasons stated in the Petition for Writ of Certiorari as supplemented by the argument in the foregoing brief, the Protective Committee for Bonds of Old Colony Railroad Company respectfully submit that their Petition should be sustained and granted, and that a writ of certiorari should issue in this cause, as provided by law, to the end that this cause may be reviewed and determined by this Court.

Respectfully submitted,

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